3-16-2016

State v. Richardson Appellant's Brief Dckt. 44042

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 44042**
Plaintiff-Respondent,	)	
	)	**NEZ PERCE COUNTY NO. CR 2012-82**
v.	)	
	)	
KYLE A. RICHARDSON,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
_____	)	

_____

BRIEF OF APPELLANT

_____

APPEAL FROM THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

_____

HONORABLE JAY GASKILL
District Judge

_____

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STATEMENT OF THE CASE

Nature of the Case

For four years, Kyle Richardson waited while the State continued his trial, then sought an appeal, then unnecessarily delayed having him transported to Idaho for trial. While Mr. Richardson waited, he was ineligible to undergo critically necessary drug treatment thereby increasing the risk that his congestive heart condition would end his life sooner, rather than later. Due to the State's delays, and despite Mr. Richardson's efforts to resolve the matter, he was not tried until four years after he was initially arrested, and thus he was only able to have eighteen months of his twelve-year, with five years fixed, Idaho sentence served concurrently with his five-year federal sentence. Further, the trial witnesses' memories were seriously impaired due to the length of time that had passed since Mr. Richardson was first arrested for selling methamphetamine to a State confidential informant (*hereinafter*, CI) on three occasions in 2011. Because Mr. Richardson unnecessarily waited for four years to have a jury trial, his Constitutional and statutory rights to a speedy trial and his rights under the Interstate Agreement on Detainers were violated, his convictions and sentences should be vacated and his case dismissed with prejudice.

Mr. Richardson also asserts that the district court erred when it admitted evidence of uncharged prior bad acts at trial. Mr. Richardson further contends that the district court erred in awarding $2,738.46 in restitution where the State failed to prove by a preponderance of the evidence the amount requested on behalf of the ISP.

Statement of the Facts and Course of Proceedings

In September of 2011, Kyle Richardson was contacted by a confidential informant and sold the informant methamphetamine in three controlled buys. (R., pp.18-19.) On January 1, 2012, Mr. Richardson was charged with three counts of delivery of methamphetamine. (R., pp.33-34.) After a preliminary hearing, the magistrate court bound Mr. Richardson over into district court, and the State filed an Information charging Mr. Richardson with three counts of delivery of a controlled substance. (R., pp.54-58, 60.) At arraignment, Mr. Richardson entered a not guilty plea to the charges. (R., p.65.) Though the original jury trial was set to occur on June 4, 2012, the State requested a continuance, and the trial was reset to August 20, 2012. (R., pp.72-74.)

On July 31, 2012, the State filed a motion seeking to use the now-deceased confidential informant's preliminary hearing testimony at trial. (R., pp.79-103.) The district court denied the motion. (R., pp.166-172.) On January 8, 2013, the State received permission to file an interlocutory appeal. (R., pp.182-183.)

On appeal, the Idaho Supreme Court reversed the district court's order denying the admission of the preliminary hearing testimony, and the remittitur was issued on July 8, 2014. (R., pp.192-202, 204.) When Mr. Richardson did not appear for a status conference on July 24, 2014, the district court issued a bench warrant even though defense counsel advised both the district court and the prosecutor that Mr. Richardson was in federal custody until March of 2017. (R., pp.205-206.) No hearings were held and no action was taken on the case until more than six months later when, from Terre

Haute FCI in Indiana, Mr. Richardson filed a Demand for Speedy Trial and Final Disposition in February of 2015. (R., pp.207-210.)

After the Demand for Speedy, the district court held **seven** hearings to ascertain the status of the prosecutor's efforts to get Mr. Richardson back to Idaho for a trial. (R., pp.211-240.)

Defense counsel stated Mr. Richardson's current location, Terre Haute, Indiana, and mentioned that he had been moved from a location in Oregon where he unfortunately was ineligible for a drug treatment program because he had state charges pending. (2/19/15 Tr. p.27, Ls.13-22.) Counsel said he wanted Mr. Richardson to get his Idaho charges resolved so he could participate in a drug treatment program in prison. (2/19/15 Tr., p.27, Ls.21-24.) The prosecutor asked the court to set another status conference in another month. (2/19/15 Tr., p.28, Ls.5-7.)

At the next month's status conference, the prosecutor again told the court that it was still planning to bring Mr. Richardson back from federal prison, and it was still in that process. (3/12/15 Tr., p.29, Ls.12-14.) Again, the prosecutor asked for another status conference in one month. (3/12/15 Tr., p.29, Ls.14-16.)

At the next status conference, the prosecutor told the court that it had not made any progress in its attempts to bring Mr. Richardson back from federal prison. (4/23/15 Tr., p.32, Ls.11-13.) Defense counsel reminded the court and prosecutor that Mr. Richardson had filed a demand for speed trial and advised them that he would be filing a motion to dismiss once the six months was up. (4/23/15 Tr., p.32, Ls.15-20.) The court set the case for another status conference in one month. (4/23/15 Tr., p.33, L.21 – p.34, L.4.)

On June 25, 2015, the district court held another status hearing. (6/25/15 Tr.[1]) The prosecutor told the court and counsel that Mr. Richardson was still in the Indiana Federal Prison, and the prison had received all of the documentation they needed before he could be transferred to the Nez Perce County Sherriff and then transported to Idaho. (6/25/15 Tr., p.16, Ls.11-17.) The prosecutor asked for another status conference in a month, hoping Mr. Richardson would be back in Idaho at that time. (6/25/15 Tr., p.16, Ls.18-20.) On July 7, 2015, the Terre Haute warden signed a Certificate of Inmate Status pursuant to the IAD. (R., p.222.)

On July 30, 2015, another status conference was held in Mr. Richardson's case. (7/30/15 Tr.) The prosecutor advised the court that there was a form missing that needed to be provided to the federal prison in order to get Mr. Richardson into their custody and asked for another status conference in four weeks. (7/30/15 Tr., p.35, Ls.13-19.)

Six months after his Demand for Speedy Trial was filed, Mr. Richardson filed a motion to dismiss for violations of his right to speedy trial, asserting that the delay in trying his case caused him to lose an opportunity to participate in an excellent drug treatment program while in prison.[2] (R., pp.230-239, 244-248, 266-268, 270-272, 275-280.)

[1] The sixteenth page of the transcripts prepared by Linda Carlton erroneously identifies the hearing date as "August 25, 2015"; however, the hearing was held on June 25, 2015 which date is correctly identified on page 4 of the Carlton transcripts (Vol. II of II).

[2] Mr. Richardson was heavily addicted to methamphetamine, yet has congestive heart failure making the use of amphetamines/methamphetamines incredibly dangerous. (PSI, p.12; 9/25/14 Tr., p.7, L.24 – p.8, L.11; *see* http://www.methproject.org/answers/does-meth-affect-your-heart.html#Heart-in-Overdrive (website last visited 3/13/17).)

On August 27, 2015, the district court set a trial date for December 7, 2015, and scheduled a time to hear the motion to dismiss. (R., pp.240-243.) The State opposed dismissal, asserting that when Mr. Richardson first demanded speedy trial, a detainer had not yet been filed. (R., pp.249-250.) The State's position was that Mr. Richardson was required to re-demand his speedy trial rights after the detainer was filed in May or June of 2015, and the 180-day time limitation set forth in the IAD did not begin until after Mr. Richardson re-demanded his right on July 22, 2015. (R., pp.249-250.) Attachments to the State's response included a May 18, 2015 letter from the prosecutor's office to Terre Haute FCI enclosing copies of documents relating to the Idaho cases, including the bench warrant, and asking that extradition proceedings begin. (R., p.253.) Mr. Richardson filed an additional brief in support of his motion, asserting that his Constitutional right to a speedy trial was independent of, and superior to, the provisions of the IAD. (R., pp.266-268.)

The district court denied Mr. Richardson's motion to dismiss after a hearing, finding that "[a] detainer was lodged on June 24, 2015; therefore speedy trial was not invoked until that date", and the case then proceeded to trial. (9/24/15 Tr.; R., pp.273-274.)

At trial, several of the State's law enforcement witnesses could not recall the specifics of the drug transactions, due to the length of time that had passed between the controlled buys and Mr. Richardson's trial. (Trial Tr., p.129, Ls.7-9; p.143, L.23 – p.144, L.2; p.145, Ls.6-8; p.170, Ls.2-4; p.179, Ls.20-22; p.181, L.24 – p.182, L.7; p.184, Ls.11-12; p.188, Ls.6-12; p.188, L.23 - p.189, L.7; p.193, Ls.4-5; p.195, Ls.11-18; p.196, Ls.4-14; p.199, Ls.14-16; p.200, Ls.15-24; p.201, Ls.14-17, 23-25; p.204, Ls.12-14;

p.208, Ls.11-14; p.217, Ls.1-3 (testimony of Officer Dammon); p.277, Ls.13-17; p.278, L.22 – p.279, L.10; p.280, Ls.20-23; p.282, L.20 – p.283, L.7; p.285, Ls.5-24; p.288, L.9 - p.289, L.22 (testimony of Officer Yount).)

During the State's case in chief, the prosecutor elicited from Officer Dammon prohibited testimony about Mr. Richardson's prior bad acts. Specifically, the prosecutor asked Officer Dammon how he became involved in the case, to which the Officer responded, "I was provided information from a confidential informant about a Kyle Richardson being involved in the distribution. . . of controlled substances." (Trial Tr., p.119, Ls.3-20.) Defense counsel objected on hearsay and I.R.E. 404(b) grounds. (Trial Tr., p.119, Ls.19-24.) The State argued that it was not hearsay as it was being used to show the effect on the listener (Trial Tr., p.120, Ls.1-6), and the district court allowed the testimony, finding that it was foundational where it was "being provided only to show the foundation for what the officer did" (Trial Tr., p.120, Ls.7-12).

Ultimately, the jury convicted Mr. Richardson of the three counts of delivery of a controlled substance, methamphetamine. (Trial Tr., p.346, L.22 – p.347, L.6; R., pp.324-325.) On each count, the district court sentenced Mr. Richardson to twelve years, with five years fixed, to be served concurrently with the other counts and with the federal sentence. (2/18/16 Tr., p.364, Ls.4-12; R., pp.355-358.)

Mr. Richardson objected to restitution, and the district court subsequently held a hearing on the State's request for reimbursement for buy money, ISP testing, and an ISP employee's testimony and travel. (5/19/16 Tr. p.11, L.5 – p.26, L.24; Augmentation, pp.1-12.) In response to the objections, the State called Officer Dammon, who testified that the department expended $2,100 for the controlled buys involving Mr. Richardson.

(5/19/16 Tr., p.15, L.6 – p.17, L.24.) Officer Dammon testified that he did not have any knowledge of David Sincerbeaux's expenses. (5/19/16 Tr., p.20, Ls.4-12; p.21, Ls.13-17.) Yet the district court awarded the amount requested by the State, holding that the defense failed to introduce evidence showing the request for restitution for Mr. Sincerbeaux's trial testimony was inappropriate. (Augmentation, pp.9-11.)

Mr. Richardson timely appealed from his judgment of conviction. (R., pp.359-362.)

ISSUES

1. Did the district court err when it violated Mr. Richardson's speedy trial rights?

2. Did the district court err in denying Mr. Richardson's motion to dismiss based on the State's failure to comply with the Interstate Agreement on Detainers' 180 day deadline?

3. Did the district court err in admitting evidence of Mr. Richardson's prior bad acts?

4. Did the district court abuse its discretion when it ordered Mr. Richardson to pay restitution in the absence of substantial evidence to support such an award?

ARGUMENT

I.

Mr. Richardson's Statutory And Constitutional Rights To A Speedy Trial Were Violated When The District Court Denied His Motion To Dismiss And Set The Case For Trial Four Years After The Information Was Filed

A. Introduction

Mr. Richardson was arrested on January 4, 2012, and sat in jail when the trial was first continued because the State's key witness was unavailable on the first trial setting of June 4, 2012. Mr. Richardson sat in jail and then prison while the State took 18 months to appeal to the Idaho Supreme Court an unfavorable district court ruling. Mr. Richardson sat in prison while the district court held a status conference upon remand, during which the prosecutor told the district court and defense counsel that it was Mr. Richardson's duty to get his Idaho case taken care of. Mr. Richardson, tired of sitting in prison and still without treatment for his severe substance abuse addiction, filed a Demand for Speedy Trial, after which he continued to sit in prison. Mr. Richardson sat in prison while the district court, in response to the Demand, held hearing, after hearing, after hearing, to check on the State's progress (or lack thereof) in having Mr. Richardson brought to Idaho to be tried. In October of 2015, Mr. Richardson finally made it to Idaho, where he sat in jail for several more months until his trial. Over the four year period of time, the trial witnesses forgot what they had observed of the controlled buys which made effective cross-examination of these witnesses difficult, if not impossible. Because Mr. Richardson's statutory and constitutional speedy trial rights were violated when he unnecessarily waited, to his detriment, for four years to

have a jury trial, his convictions and sentences should be vacated and his case dismissed with prejudice.

B. The District Court Violated Mr. Richardson's Right To A Speedy Trial As Guaranteed By The United States And Idaho Constitutions

By denying Mr. Richardson's motion to dismiss, the district court violated his right to a speedy trial as guaranteed by the United States Constitution and Idaho Constitution. The United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." U.S. CONST. amend. VI. In *Barker v. Wingo*, 407 U.S. 514 (1972), the United States Supreme Court recognized that the "speedy" trial guaranteed by the Sixth Amendment is a "more vague concept than other procedural rights," and that what is considered "speedy" will vary from case to case, depending on the unique facts of each. *Id*. at 521-30. Thus, the *Barker* Court adopted an *ad hoc* approach, taking into consideration four factors: (1) the length of the delay; (2) the reason(s) for the delay; (3) the defendant's assertion(s) of his right; and (4) the prejudice suffered by the defendant owing to the delay. *Id*. at 530-33. With regard to the balancing of these four factors, the Court held as follows: "We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial. Rather, they are related factors that must be considered together with such other circumstances as may be relevant." *Id*. at 533.

The Idaho Constitution contains a virtually identical speedy trial guarantee. IDAHO CONST. art I § 13. Accordingly, the Idaho Supreme Court has adopted the same four-factor test for evaluating speedy trial claims under the Idaho Constitution as the

United States Supreme Court has applied for evaluating speedy trial claims under the United States Constitution.[3] *State v. Young*, 136 Idaho 113, 117 (2001).

Under the Idaho Constitution, the period of delay, for speedy trial purposes, is measured from the date formal charges are filed or the defendant is arrested, whichever occurs first. *See State v. Risdon*, 154 Idaho 244 (Ct. App. 2012) (holding a fifteen month delay is long enough to be presumptively prejudicial and, therefore, triggered an inquiry into whether it violated the defendant's constitutional speedy trial right). The defendant's assertion of his right to a speedy trial is entitled to strong evidentiary weight in determining whether the defendant is being deprived of that constitutional right. *State v. Lopez,* 144 Idaho 349, 353 (Ct. App. 2007). Prejudice is to be assessed in light of the interests the constitutional right to a speedy trial is designed to protect: (1) to prevent oppressive pretrial incarceration; (2) to minimize anxiety and concern of the accused; and (3) to limit the possibility the defense will be impaired. *Id*. at 354.

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[3] Although the right to a speedy trial under the Idaho Constitution is not necessarily identical to the right to a speedy trial under the United States Constitution, *State v. Davis*, 141 Idaho 828, 836 (Ct. App. 2005), the only difference identified thus far is the starting point for measuring the period of delay. According to the *Young* Court:

> Under the Sixth Amendment, the period of delay is measured from the date there is "a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge." *United States v. Marion*, 404 U.S. 307, 320, 92 S. Ct. 455, 463, 30 L. Ed. 2d 468, 479 (1971). Under the Idaho Constitution, the period of delay is measured from the date formal charges are filed or the defendant is arrested, whichever occurs first.

Young, 136 Idaho at 117. However, this distinction is not material to the present appeal because Mr. Richardson was arrested on January 4, 2012, thus "starting the clock" on the speedy trial issue for purposes of both the Idaho Constitution and the United States Constitution.

As set forth in detail below, under the *Barker* test, this Court should find that Mr. Richardson's speedy trial rights, under both the Idaho Constitution and United States Constitution, were violated when the State took over four years to bring him to trial.

1. The Four Year Delay Is Presumptively Prejudicial

The threshold factor to be considered pursuant to *Barker* is the length of delay. With regard to this factor, the United States Supreme Court has held as follows:

> The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go in the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case.

Barker, 407 U.S. at 530-31.

Mr. Richardson was arrested on January 4, 2012, but was not tried until December 7, 2015, a delay of nearly four years (1,433 days). This delay ought to be sufficient to "trigger" further inquiry because, as the United States Supreme Court has observed, "[d]epending on the nature of the charges, the lower courts have generally found postaccusation delay 'presumptively prejudicial' *at least* as it approaches one year." *Doggett v. United States*, 505 U.S. 647, 652 n.1 (1992) (emphasis added). This observation appears to be consistent with Idaho precedent, as Idaho appellate courts undertake full *Barker* inquiries not only with trial delays around a year, but sometimes even with trial delays as short as seven months. *See, e.g., State v. Hernandez*, 133 Idaho 576, 582-83 (Ct. App. 1999) (implicitly finding a delay of nine months to be sufficient to trigger a full inquiry under *Barker*); *State v. Reutzel*, 130 Idaho 88, 94 (Ct. App. 1997) (same); *State v. Wavrick*, 123 Idaho 83, 88 (Ct. App. 1992) (holding that

a delay of less than sixteen months is sufficient to trigger a full inquiry); *State v. Talmage*, 104 Idaho 249, 252 (1983) (holding that a delay of seven and one-half months is sufficient to trigger a full inquiry); *State v. Lindsay*, 96 Idaho 474 (1975) (holding that a delay of fourteen months is sufficient to trigger a full inquiry). Perhaps this is because Idaho has a statute, the predecessor of which pre-dates statehood, that evidences the Idaho Legislature's belief that a delay of six months is simply too long to wait to try a defendant in the average case. *See* I.C. § 19-3501 (providing that, unless "good cause" is shown, if the defendant is not tried within six months from the filing of the information or the defendant's arraignment following indictment, the case against him must be dismissed); *State v. Clark*, 135 Idaho 255, 257-58 (2000) (discussing the history of I.C. § 19-3501).[4]

2. The State's Reasons For The Delay, Taken As A Whole, Do Not Justify The Delay

The second factor to be considered is the reason for the delay. *Barker*, 407 U.S. at 531-532. Mr. Richardson recognizes that any delay attributable to him will not count towards the speedy trial calculation. *See United States v. Loud Hawk,* 474 U.S. 302, 316-17 (1986); *State v. Folk,* 151 Idaho 327, 332 (2011) (holding defendant's request to postpone the trial waives protections of speedy trial statute, even if trial is rescheduled within six-month period). However, he contends that the both the district court and the State are responsible for the delay and not himself.

The *Barker* Court held that, with respect to the delays attributable to the government:

[4] Mr. Richardson analyzes I.C. § 19-3501 in some detail below, as that provision underlies his claim that he was denied his statutory right to a speedy trial.

> [D]ifferent weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

Barker, 407 U.S. 531.

The initial delay of Mr. Richardson's trial began when the State's key witness was unavailable for trial on the first trial setting, and the court continued the trial for two months. Then the State's permissive appeal delayed Mr. Richardson's trial by over two years, and when a warrant was issued, it was apparently not served until approximately seven months later. The warrant prompted Mr. Richardson to file a demand for speedy trial in an effort to move the process along, but neither the State nor the district court successfully brought Mr. Richardson to trial until December of 2015, nearly a year after he had initially made his speedy trial demand, and nearly four years since he was first charged with the crimes. The State has not provided any reasons for the delay, other than to claim that no violation occurred because it did not place a detainer on Mr. Richardson until May or June of 2015, and the district court ruled in favor of the State. For the reasons set forth below, none of the justifications offered by the State or the court constitute "valid reasons" that might immunize the government from responsibility for the nearly four year delay in bringing Mr. Richardson to trial.

a. The State's Continuance Delayed The First Trial Setting

Two months before the trial set of June 4, 2012, the State filed a motion for a continuance as one of its "key" witnesses was unavailable between June 4th and 8th, 2012. (R., pp.72-73.) After the State moved for a continuance, the district court

vacated the hearing and reset the trial for August 20, 2012, a continuance of more than two months. (R., pp.74-75.) The second trial setting was still within the speedy trial limits.

b. The State Sought A Permissive Appeal Which Caused The Second Set Trial Date To Be Necessarily Vacated And Delayed The Case By Another Two Years

On July 31, 2012, twenty days before trial, the State filed a motion seeking to admit the preliminary hearing transcript of a witness who had passed away following the preliminary hearing. (R., pp.79-103.) Mr. Richardson promptly filed an objection to the State's motion in limine. (R., pp.119-152.)

Two weeks after the State's motion was filed, the district court vacated the trial date to allow the State additional time to prepare a reply brief, and so the court could schedule argument. (8/16/12 Tr., p.13, L.25 – p.14, L.8.) After hearing argument on the State's motion, the district court denied it. (9/20/12 Tr.; R., pp.166-171.) The State filed a motion for permission to appeal the district court's ruling on its Motion to Admit Preliminary Hearing Transcript Testimony of Robert Bauer, and the Idaho Supreme Court granted the State's motion for permissive appeal. (R., pp.174-175, 180, 182-183.) Eighteen months later, the Idaho Supreme Court reversed the district court's order denying the State's motion to use the preliminary hearing transcript, remanded the case to the district court for further proceedings, and a remittitur was issued. (R., pp.192-202, 204.)

The United States Supreme Court held in *U.S. v. Loud Hawk*, 474 U.S. 302, 315-16 (1986), that "[u]nder *Barker,* delays in bringing the case to trial caused by the Government's interlocutory appeal may be weighed in determining whether a defendant

has suffered a violation of his rights to a speedy trial." The eighteen month delay caused by the State's interlocutory appeal violated Mr. Richardson's speedy trial rights.

c. Mr. Richardson Asserted His Right To A Speedy Trial On February 2, 2015; Thus The District Court Erred In Concluding That Mr. Richardson's Speedy Trial Rights Were Not Invoked Until June 24, 2015

The third factor in the *Barker* analysis is "[w]hether and how the defendant assert[ed] his right" to a speedy trial. *Id*. Because the more serious the prejudice attendant to a delayed trial is, "the more likely a defendant is to complain," the "defendant's assertion of his speedy trial right . . . is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right" to a speedy trial. *Id*. at 531-32.

The district court erred in finding Mr. Richardson's speedy trial rights were not invoked until June 24, 2015. On February 2, 2015, Mr. Richardson caused to be filed a Demand for Speedy Trial. (R., pp.207-210.) The Demand was served both on the prosecutor and the district court. (R., pp.207-208.)

Further, the parties including the court indicated on the record that they were well aware of Mr. Richardson's speedy trial rights and that he was asserting them. The district court scheduled a hearing for February 19, 2015, to check on the status of the speedy trial demand. (2/19/15 Tr., p.26, Ls.9-19.) At the February 19, 2015 status conference hearing, the district court mentioned receiving Mr. Richardson's demand for speed trial and final disposition. (2/19/15 Tr., p.26, Ls.17-19.) The prosecutor said, "Your Honor, we are working on that with the U.S. Attorney's Office, on filing the appropriate paperwork and arranging for a transport." (2/19/15 Tr., p.27, Ls.10-12.)

Two months later, defense counsel reminded the court and prosecutor that Mr. Richardson had filed a demand for speedy trial and advised them that he would be filing a motion to dismiss once the six months was up. (4/23/15 Tr., p.32, Ls.15-20.)

Overall, the district court held seven hearings in Mr. Richardson's absence from February 19, 2015, to August 27, 2015, to ascertain the status of the case and to consider Mr. Richardson's demand for speedy trial. (R., pp.212-218, 229, 240.)

Although the district court ultimately denied Mr. Richardson's motion to dismiss finding his speedy trial right was not invoked until a formal detainer was put in place on June 24, 2015 (R., p.273), such a finding is clearly contradicted by the record. As the *Barker* Court recognized, Mr. Richardson's assertions of his right should weigh heavily against the State.

d. Mr. Richardson Suffered Prejudice As A Result Of The Delay

The final *Barker* factor is the prejudice suffered by the defendant owing to the delay. The Supreme Court has held that prejudice in this regard includes: (a) the detrimental impact on career and family that is attendant to oppressive pretrial incarceration; (b) anxiety and concern of someone waiting for trial; and, of course, (c) the impairment of the defense. *Barker*, 407 U.S. at 532. Obviously, the last form of prejudice is of the greatest concern because it "skews the fairness of the entire system." *Id*.

In the present case, all three types of prejudice appear to be present. Mr. Richardson was never released from federal custody, but had pending state charges so was ineligible for the drug treatment programming he so desperately needed. (*See* PSI, pp.9-14, (explaining Mr. Richardson's congestive heart failure and

his heavy use of and addiction to methamphetamine).) Although Mr. Richardson was initially sent to a superb drug treatment facility in Oregon, due to his pending state cases in Idaho he was transferred to Indiana and thereby lost the opportunity to participate in the much-needed drug treatment program. (2/19/15 Tr., p.27, Ls.13-24; R., p.268; PSI, p.10.) Further, Mr. Richardson had to contend with the anxiety of waiting nearly four years for his trial, not knowing whether he might walk out of jail a free man, be condemned to a life in prison, or something in between.

In addition, Mr. Richardson suffered actual prejudice because Officers Dammon and Yount's memories faded by the time Mr. Richardson was actually tried in December of 2015. At trial, Officer Dammon attributed his inability to recall many of the events surrounding the crimes Mr. Richardson was alleged to have committed due to the four year delay between the investigation and trial. (Trial Tr., p.188, L.23 - p.189, L.7.) For example, during the defense's cross-examination of Officer Dammon, he could not recall whether the CI was eager to assist the police or reluctant to do so. (Trial Tr., p.179, Ls.16-22.) While testifying, Officer Dammon indicated that he did not remember whether the CI reached inside the storage unit before he met with Mr. Richardson. (Trial Tr., p.181, Ls.18-20.) Officer Dammon could not remember if he lost sight of the CI's vehicle on the way to the location where he was scheduled to meet Mr. Richardson. (Trial Tr., p.188, L.23 – p.189, L.8.) It was clear that the significant amount of time that had passed impacted Officer Dammon's memory and made

effective cross-examination of him very difficult (Trial Tr., p.189, Ls.1-7[5]); the long delay in trying Mr. Richardson harmed his defense.

Officer Yount's memory was similarly affected. Officer Yount told the prosecutor that he did not recall all of the specific details of the controlled purchases because "[i]t happened four years ago." (Trial Tr., p.277, Ls.10-16.) It was clear from his testimony that his inability to recall was due to the four years that had elapsed since the investigation. (Trial Tr., p.277, Ls.13-17; p.288, L.9 - p.289, L.22.) Later, during the cross-examination of Officer Yount, the officer could not recall where he was stationed for surveillance, how far away he was, whether he saw any exchange of drugs or money, whether he saw Mr. Richardson get out of the vehicle, or who was with him during the investigation. (Trial Tr., p.285, Ls.5-24; p.287, Ls.14-20; p.289, Ls.6-10.) As a result, defense counsel had difficulty in the cross-examination of this witness—the delay of over four years harmed Mr. Richardson's ability to effectively cross-examine Officer Yount.

Mr. Richardson's defense was significantly compromised because the witnesses could not recall the circumstances by which Mr. Richardson was alleged to have sold methamphetamine—including locations and whether the CI was out of the sight of the officers at critical times. Mr. Richardson's defense was further compromised because the improper introduction of propensity evidence as to why Officer Dammon began

[5] Officer Dammon appeared to be frustrated. When he again answered "Not that I recall, no," defense counsel tried to clarify whether he affirmatively recalled not losing sight of the CI or whether he did not remember whether he did or did not lose sight of the CI. (Trial Tr., p.188, L.23 – p.189, L.4.) Officer Dammon responded, "Beings this was four years ago -- . . . -- I'm testifying off what I put in my report." (Trial Tr., p.189, Ls.5-7.)

investigating Mr. Richardson—the State was able to prove its case by demonstrating at trial that because he committed this crime in the past, he must have committed the crime in the instant case.

3. Balancing

When all of the above factors are taken together—the extremely long delay, all of which was attributable to the government, Mr. Richardson's assertion of his right, and the prejudice suffered—this Court should find that Mr. Richardson's right to a speedy trial, as guaranteed by both the Idaho Constitution and the United States Constitution, has been violated.

C. The District Court Violated Mr. Richardson's Right To A Speedy Trial As Guaranteed By Idaho Statute

Mr. Richardson's speedy trial rights as guaranteed by Idaho Code §§ 19-106 and 19-3501 were violated when it took the State nearly four years to bring him to trial. (R., p.276.) Idaho Code § 19-106 also guarantees to every criminal defendant in Idaho the right "[t]o a speedy and public trial," although it does not define "speedy." Nevertheless, Idaho Code elsewhere provides as follows:

> The court, unless good cause to the contrary is shown, must order the prosecution or indictment to be dismissed in the following cases:
>
> . . .
>
> (2) If a defendant, whose trial has not been postponed upon his application, is not brought to trial within six (6) months from the date the information is filed with the court.

I.C. § 19-3501. This statutory provision "supplements" the above-referenced Constitutional guarantees of a "speedy" trial, and has been interpreted to give

"additional protection beyond what is required by the United States and Idaho Constitutions." *State v. Clark*, 135 Idaho 255, 257-58 (2000).

Under § 19-3501, the government is required to demonstrate "good cause"[6] in order to have the defendant's trial continued beyond six months. The showing of "good cause" is evaluated in terms of the "reason for the delay," as that language was used in *Barker*. *Clark*, 135 Idaho at 260. The Idaho Supreme Court has held that "good cause means that there is a substantial reason that rises to the level of a legal excuse for the delay." *Id*.

For the reasons set forth in detail in subpart B(2), above, there was neither a "valid reason" nor "good cause" for the district court to have permitted the State to continuously requests status hearings while the State was dilatory in learning how to effect a detainer and investigating how to initiate Mr. Richardson's transport to Idaho. Accordingly, the district court erred in denying Mr. Richardson's statutory right to a speedy trial.

II.

The District Court Erred In Denying Mr. Richardson's Motion To Dismiss Based On The State's Failure To Comply With The 180-Day Deadline Under The Interstate Agreement On Detainers

A. Introduction

A warrant was issued for Mr. Richardson's arrest on July 24, 2014. (R., p.281.) When Mr. Richardson learned of the bench warrant, he filed a Demand for Speedy Trial and Final Disposition on February 2, 2015. (R., pp.207-210.) Despite his request, the

district court found that a detainer was not placed on Mr. Richardson until June 24, 2015, and he was not transported to Nez Perce County to resolve the charges until October 23, 2015. (R., pp.40, 90, 281, 286.) Although Mr. Richardson filed a motion to dismiss due to the violation of his speedy trial rights (*see* Section I), the district court concluded that the IAD was applicable, and Mr. Richardson's speedy trial clock was not started until the detainer was lodged on June 24, 2015. (R., pp.273-274.)

Mr. Richardson asserts that the district court erred in failing to grant his motion to dismiss because the prosecutor was dilatory in having a detainer placed, and misled the court and counsel as to how Mr. Richardson could be brought back to Idaho for trial. Where Mr. Richardson became aware of a bench warrant in this case on January 6, 2014, and filed a demand for speedy trial on February 2, 2015, the district court should have found Mr. Richardson substantially complied with the Interstate Agreement on Detainers (*hereinafter,* IAD) and dismissed the case.

B. Standard Of Review

Whether the requirements of the IAD have been met is a mixed questions of law and fact. *United States v. Reed*, 910 F.2d 621 (9th Cir. 1990). The court reviews such cases *de novo*. *Id*.

C. The District Court Erred In Denying Mr. Richardson's Motion To Dismiss Based On The State's Failure To Comply With The 180-Day Deadline Under The IAD

The district court erred in concluding that Mr. Richardson's right to a speedy trial, as guaranteed by the IAD, was not invoked until a detainer was lodged on June 24,

[6] *See State v. Stuart*, 113 Idaho 494, 495 (Ct. App. 1987) ("The burden is on the state to show good cause for the delay.").

2015. The district court concluded that Mr. Richardson's speedy trial rights under the IAD were not violated. Mr. Richardson asserts that the district court erred in denying his motion to dismiss.

The Federal Government, the District of Columbia, and forty-eight (48) states, including Idaho, have entered into the Interstate Agreement on Detainers. *Alabama v. Bozeman,* 533 U.S. 146, 148 (2001). The purpose of the IAD is set forth in the text of the Idaho code section adopting the IAD:

> The agreement on detainers is hereby enacted into law and entered into by this state [Idaho] with all other jurisdictions legally joining therein in the form substantially as follows:
>
> (a) The party states find that charges outstanding against a prisoner, detainers based on untried indictments, informations or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints. The party states also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

I.C. § 19-5001(a). In accordance with this purpose, the IAD creates uniform procedures for expeditiously resolving pending charges and detainers against prisoners in the party states. *See* I.C. § 19-5001 *et seq*. Specifically, the IAD provides that once a person,

> has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred eighty (180) days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his

> request for a final disposition to be made of the indictment, information or complaint[.]

I.C. § 19-5001(c)(1). Because the IAD is a congressionally sanctioned compact, it falls within the purview of the Compact Clause of the United States Constitution; it is a federal law subject to federal construction. *New York v. Hill,* 528 U.S. 110, 111 (2000); United States Constitution, Art. I, §10, cl.3. Both Indiana and Idaho are parties to the IAD agreement. I.C. § 19-5001(a); Indiana Code § 35-33-10 *et seq.*

Further, the United States Supreme Court has interpreted the Agreement as follows:

> Article IX of the Detainer Agreement states that the Agreement "shall be liberally construed so as to effectuate its purpose." The legislative history of the Agreement, including the comments of the Council of State Governments and the congressional Reports and debates preceding the adoption of the Agreement on behalf of the District of Columbia and the Federal Government, emphasizes that a primary purpose of the Agreement is to protect prisoners against whom detainers are outstanding.

Cuyler v. Adams, 449 U.S. 433, 448–49 (1981).

The requirements necessary for a prisoner to invoke the protections of the IAD include: (1) a written detainer; (2) written notice to the appropriate court of the prosecuting officer's jurisdiction of the place of the prisoner's incarceration; (3) a request for a final disposition of the pending indictment, information or complaint; (4) a certificate of the appropriate official having custody of the prisoner stating the term of the commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner. I.C. § 19-5001(c)(1). One of the primary purposes of passage of the IAD

was to minimize the adverse effects detainers had upon prisoners: "[b]ecause a detainer remains lodged against a prisoner without any action being taken on it, he is denied certain privileges within the prison, and rehabilitation efforts may be frustrated." *United States v. Mauro,* 436 U.S. 340, 360 (1978). In so seeking to achieve the IAD's intended purpose, the Idaho Legislature has instructed that "[t]his agreement shall be liberally construed so as to effectuate its purpose." I.C. § 19-5001(i).

In *Fex v. Michigan,* 507 U.S. 43 (1993), the United States Supreme Court considered whether the 180-day time period under the IAD is triggered by the date the inmate's request for disposition is received by the prosecutor in the receiving state, or the date the request for disposition is received by the warden in the sending state. The Court concluded "that the receiving State's receipt of the request starts the clock." *Id.* at 51. The Court thus held the 180-day time period under the IAD "does not commence until the prisoner's request for final disposition of the charges against him has actually been delivered to the court and prosecuting officer of the jurisdiction that lodged the detainer against him." *Id.* at 52. The decision in *Fex* emphasizes the importance of the court and prosecutor in a receiving State that issues a detainer against a prisoner receiving actual notice of the request for disposition under the IAD.

The Ninth Circuit's interpretation of the IAD is instructive. *See State v. Johnson*, 196 F.3d 1000 (9th Cir. 1999). The *Johnson* Court was concerned with whether a letter, sent to the district court by the prisoner's public defender notifying the court of the prisoner's invocation of his IAD right, substantially complied with the "written notice" of IAD. *Id.* 196 F.3d at 1004. The Ninth Circuit concluded that the letter satisfied the requirements under IAD as it was "undisputed that the public defender's letter to the

court contained the information required by the IAD to be conveyed to the district court, for the letter expressly stated that Johnson was serving a sentence in the state of Washington and that he requested a speedy trial. *Id.* Likewise, in *United States v. Berg*,[7] the prisoner, Berg, had mailed a letter, entitled "Demand for Speedy Trial," which referenced the IAD, to both the prosecuting U.S. Assistant Attorney and court. *Id.* at 1. A few months later, Berg mailed a second "Demand for Speedy Trial" to the prosecutor and the court. *Id.* In both filings, Berg "listed his address as the New Mexico Department of Corrections in Clayton, New Mexico and demanded that there be timely disposition of the pending federal charge pursuant to the IAD." *Id.* The Court concluded that Berg's filing substantially complied with IAD:

> [I]t seems clear that the defendant's demands for a speedy trial substantially complied with the information required under the IAD. Both of the filings sent to the court and the U.S. Attorney's office were captioned with his name and the correct case number and were titled "*DEMAND FOR SPEEDY TRIAL.*" . . . They expressly stated that the defendant was requesting a speedy trial under the IAD. In the second letter dated January 11, 2011, he also indicated that he was "sentenced and in custody."

Id. at 4.

While there have been only a few Idaho appellate court cases interpreting the IAD, one recent case was *State v. Mangum*, 153 Idaho 705 (Ct. App. 2012). In *Mangum*, the Idaho Court of Appeals held that the 180-day time period does not begin to run until the receiving state has received the requisite documentation from the sending state. *Id*. at 713. The *Mangum* Court acknowledged a circuit split on strict versus substantial compliance with the IAD, and opted for a strict interpretation of the IAD. *Id*. at 711. However, the *Mangum* Court first discussed the lack of evidence that

[7] *U.S. v. Berg*, 2011 WL 3471216 (D. Guam 2011).

the delays in filing the detainer and in forwarding the certifications was the result of purposeful interference with Mr. Mangum's IAD rights. *Id*. at 713. The Court held, "we conclude the IAD requires strict compliance with its request provisions, at least where no intentional interference by State parties is shown," apparently marking an exception to strict compliance when justice may so require. *Id*.

1. The State's Misfeasance Excuses Mr. Richardson From Strictly Complying With The IAD Where The State Delayed In Having The Detainer Placed And The State And The District Court Affirmatively Misled Mr. Richardson As To His Obligations To Have Himself Transported To Idaho For Trial

The purpose of the IAD "is to address concerns that untried charges pending in other jurisdictions and difficulties in securing a speedy trial 'produce uncertainties which obstruct programs of prisoner treatment and rehabilitation.'" *Mangum*, 153 Idaho at 709 (citing I.C. § 19-5001(a).) Although the states adopting the IAD must do so by statute, the United States Supreme Court has held that the IAD's interpretation presents a question of federal law. *Mangum*, 153 Idaho at 709.

Because the statute is to be "liberally construed" to rapidly dispose of outstanding detainers, when the prisoner has attempted to obtain a speedy trial, but the government has failed to fulfill its obligations under the Act, courts have dismissed indictments not prosecuted within 180 days. *See United States v. Reed*, 910 F.2d 621, 625-26 (9th Cir. 1990); *see also United States v. Smith*, 696 F.Supp. 1381 (D. Or. 1988) (holding that the U.S. Marshal's failure to forward one of the required supporting documents to the appropriate court was not fatal to the prisoner's claim because "a prisoner's rights under the IADA should not be subject to intentional or negligent sabotage by government officials").

In *Reed*, the defendant was notified of the charge against him, but was misled by a deputy and was not provided with the correct speedy trial request form. *Reed*, 910 F.2d at 624. Despite finding that he did not adequately invoke his speedy trial rights, the Ninth Circuit held that Reed's indictment had to be dismissed for violation of the speedy trial provision of the IAD. *Id*. at 626. The Court held, "in cases where the government has failed to meet its obligations, and the prisoner has attempted, but through no fault of her own failed to comply with the technical requirements of the Act, the IADA's remedial provisions still apply." *Reed*, 910 F.2d at 624.

a. The State Unreasonably Delayed In Having A Detainer Placed On Mr. Richardson

For five months, the prosecutor represented to the district court and defense counsel that she was doing everything possible to bring Mr. Richardson back to Idaho for trial. (2/19/15 Tr.; 3/12/15 Tr.; 4/23/15 Tr.; 6/25/15 Tr.) In reality, the prosecutor apparently did not successfully place a detainer on Mr. Richardson—essentially the first step in having him brought back to Idaho—until late June of 2015. (R., p.255.) Although the prosecutor told the court and counsel at every monthly status conference that she was working on it, or had nearly completed the process, she did not take the first step to bring Mr. Richardson back to Idaho until June 24, 2015, almost five months after he filed the demand for speedy trial.

Here, like in *Johnson* and *Berg*, there is no question the proper court and the proper prosecuting agency that had lodged the detainer against Mr. Richardson, received actual notice of Mr. Richardson's request for final disposition as of February 2, 2015. (R., pp.207-210.) Moreover, both the court's and the prosecutor's actual notice

and knowledge of the request for disposition is clear from a review of the transcript of the hearing held in Mr. Richardson's absence before the district court on February 19, 2015. (*See* 2/19/15 Tr., p.26, L.17 – p.27, L.12.) Indeed, no one appears to dispute that both the court and the prosecutor's office had actual knowledge and notice of Mr. Richardson's repeated requests for speedy resolution of the pending charges. The Idaho Legislature has mandated that the IAD "shall be liberally construed so as to effectuate its purpose." I.C. § 19-5001(i). It would subvert the purpose of the IAD if the agency charged with issuing the detainer misinformed both the court and defense counsel of the process necessary to initiate the IAD and mislead them to place the burden on the defendant. The prosecutor claimed, after she received actual notice of Mr. Richardson's desire to resolve the pending charges, that the IAD was not effective until after she confirmed with the holding institution that she formally place a detainer. This is precisely what the prosecutor asked and precisely what the district court ordered.

The district court treated June 24, 2015, the date the Nez Perce County Prosecutor's office confirmed with the Indiana Warden that she wished to have a detainer placed on Mr. Richardson, as the triggering date for the 180-day deadline. (R., p.273.) However, the district court erred finding that a IAD was not triggered until a *formal* detainer from Idaho was ultimately lodged in Indiana against Mr. Richardson. Mr. Richardson had provided actual notice to both the court and prosecutor of his intent to invoke the provisions of I.C. § 19-5001, and it was only due to the State's misfeasance in failing to timely place a detainer that the State was then able

successfully argue that Mr. Richardson did not meet the IAD's requirements until the date the prosecutor officially asked a detainer to be placed.

b. The Prosecutor And The District Court Affirmatively Misled Mr. Richardson As to The Process By Which He Could Resolve His Idaho Charges

On July 24, 2014, approximately a week after the remittitur was issued in the permissive appeal, the district court held a status hearing on Mr. Richardson's case. (7/24/14 Tr., p.22, L.20 – p.23, L.3.) At the hearing, held in Mr. Richardson's absence, the prosecutor advised the parties that Mr. Richardson was incarcerated in federal prison and was not expected to be released until March of 2017, and the prosecutor requested a bench warrant. (7/24/14 Tr., p.22, L.24 – p.23, L.3.) Defense counsel asked that his client be brought back to Idaho to resolve his pending cases before his federal prison sentence was finished in three years. (7/24/14 Tr., p.23, Ls.5-9.) The prosecutor then said, "Your Honor, the State does have information. That needs to be initiated by the defendant." (7/24/14 Tr., p.23, Ls.16-18.) She told the court and defense counsel that the defendant was to initiate the process to have him transported back to Idaho in the federal courts, and the district court confirmed the correctness of her statement. (7/24/14 Tr., p.23, L.1 – p.24, L.6.) However, both the prosecutor and the district court had wrongly informed the defense.

2. A Warrant Is Equivalent To A Detainer In This Circumstance

The United States Supreme Court has implicitly recognized that documents other than those explicitly labeled "detainers" may trigger the protection of the IAD. In *United States v. Mauro,* 436 U.S. 340, 349 (1978), the Supreme Court considered whether the

IAD is triggered when the United States uses the writ of habeas corpus *ad prosequendum* (*hereinafter,* Writ) to obtain custody of state prisoners. The Court noted the Writ, including its historical role and function, "bear little resemblance to the typical detainer which activates the provisions of the [IAD] Agreement." *Id.* at 357.

In distinguishing the Writ from an IAD detainer, the Court recognized the following characteristics of a detainer: (1) it can be lodged against a prisoner at the behest of the prosecutor or law enforcement officer without judicial review; (2) it does not require the immediate presence of a prisoner but instead serves to put institution officials on notice that a prisoner is wanted by another jurisdiction "upon his release from prison"; and (3) further action is required by the receiving State to obtain the prisoner. *Id.* at 358. Although the IAD does not define a detainer, House and Senate reports relating to the IAD explain the detainer is "a notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to face pending criminal charges in another jurisdiction." *Id.* at 359 (citations omitted). In contrast, Writs are immediately executed, they are issued by a federal court, and they have a long history dating back to the first judiciary act. *Id.* at 360-61. Given these differences, the problems the IAD sought to eliminate do not arise with the Writ. Thus, the Court held that a Writ is not a detainer for purposes of the IAD. *Id*. at 361.

For the same reasons the *Mauro* Court found the Writ was not a detainer for IAD purposes, a *warrant is a detainer* for IAD purposes; it can be lodged against a prisoner at the behest of the prosecutor or a law enforcement officer; it does not require the immediate presence of a prisoner but instead puts institution officials on notice that a prisoner is wanted by another jurisdiction "upon his release from prison"; and finally,

additional action is required before the receiving State can obtain the prisoner. *Id.* at 358. The warrant and the detainer are thus indistinguishable in their effect for IAD purposes.

This point was recognized by the United States Supreme Court in *Carchman v. Nash*, 473 U.S. 716,727 (1985). In *Carchman,* the Court determined the plain language of the IAD, as well as its legislative history, reflected that the IAD was intended only to apply to detainers premised on untried indictments, informations or complaints, thereby excluding detainers based on probation violations. *Id.* at 726-27. In reaching this conclusion, the Court cited to the IAD drafters' definition of a detainer under the IAD: "A detainer may be defined as a warrant filed against a person already in custody with the purposes of insuring that he will be available to the authority which has placed the detainer." *Id.* at 727 (quoting Suggested State Legislation, Program for 1957, p.74). While agreeing with this definition and the fact that a detainer could arise from parole or probation violations, the Court determined that by its own terms, the IAD did not apply to all detainers, only those arising from untried indictments, informations or complaints. *Id.*

The arrest warrant in Mr. Richardson's case was signed by the district court after Mr. Richardson failed to appear for a status conference on June 24, 2014. (R., p.205.) The warrant was served on Mr. Richardson in January of 2015. (R., p.231.) The State initiated extradition proceedings by May 18, 2015, by sending a letter regarding "Extradition Proceedings" which included information on the Idaho charges as well as an "IAD Prosecutor's Certification." (R., pp.253-255.) Further, Mr. Richardson waived extradition in a Notice of Untried Indictment dated June 1, 2015. (R., p.264.) *See Pyzer v. State,* 109 Idaho 376 (Ct. App. 1985) (a warrant and request for extradition

may constitute a detainer under I.C. § 19-5001); *cf. State v. Smith,* 119 Idaho 11, 12 (Ct. App. 1990) (where defendant failed to establish a warrant for extradition was issued and served on Wyoming authorities demanding his appearance in Idaho, defendant's wavier of extradition did not trigger the IAD).

As a result, the district court erred in considering the date the prosecutor confirmed to the authorities at Terre Haute FCI that she *did* want them to treat the warrant as a detainer, to be the date of the detainer; instead, the date of the detainer is the date Mr. Richardson had a warrant outstanding against him in Idaho (Nez Perce County), *and* the prosecutor requested extradition. *See Pryzer*. For these reasons, much like a prematurely filed notice of appeal (*see* Idaho Appellate Rule 17; *Weller v. State,* 146 Idaho 652, 653-54 (Ct. App. 2008)), the warrant should be treated as a ripe, or perfected detainer, as of the date Mr. Mangum was served with it: January 6, 2015. (R., p.231.) Alternatively, the prosecutor's letter dated May 18, 2015, which sought to extradite Mr. Richardson should be treated as the date the detainer was perfected. *See Pryzer*.

3. Mr. Richardson Substantially Complied With The IAD's Requirements

As set forth above, Idaho Code § 19-5001 (c)(1) provides:

> The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of the commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner.

I.C. § 19-5001 (c)(1). The purpose of the certificate of status is to "allow[] the prosecutor to make a rational decision whether to prosecute and the State may, for example, decline to prosecute upon learning the prisoner is already serving a lengthy

sentence elsewhere on a more serious charge." *State v. Moe*, 581 N.W.2d 468, 471-472 (N.D. 1998). Both the Ninth Circuit and the Idaho Legislature mandate that the IAD statute must be liberally construed to effectuate its purpose. *See State v. Johnson*, 196 F.3d 1000 (9th Cir. 1999); Idaho Code § 19-5001(i). Thus, the question before this Court is whether Mr. Richardson substantially complied with I.C. § 19-5001.

Mr. Richardson asserts that he substantially complied with I.C. § 19-5001 (c)(1) as he provided all of the information needed for the prosecutor to make a decision to prosecute his case, i.e., his federal case number, his term of commitment, the time he has already served, the time remaining to be served on the sentence, his good time credit, and his approximate parole eligibility date. (*See* R., pp.207-210.) *See United States v. Dent*, 149 F.3d 180 (3rd Cir. 1998) (holding defendant did not substantially comply with the IAD requirements where "Dent's letter did not include his term of confinement, the time already served, the time remaining to be served on his sentence, or any information concerning good-time credits or parole eligibility); *State v. Roberts*, 427 So.2d 787 (Fla. Dist. Ct. App. (1983) (holding defendant was entitled to IAD relief even though he did not provide authorities with a formal certificate of inmate statute because he submitted a memorandum that stated his "jail credit time, a conditional early release date, a maximum incarceration date and a parole eligibility date."); *State v. Smith*, 858 F.2d 416 (N.M. Ct. App. 1993) (holding defendant did not have to provide the actual certificate inmate statute to substantially comply with IAD, but "he did have an obligation to furnish the information that would be contained therein."); *U.S. v. Berg*, 2011 WL 3471216 (D. Guam 2011) (finding that the defendant had substantially complied with the certificate of inmate status requirement by demanding a speedy

resolution of his pending federal charge and providing the address of the New Mexico Department of Corrections where he was currently serving his sentence.)

Here, it is undisputed that Mr. Richardson sent his demand to the appropriate court and the Nez Perce County prosecutor's office asking for a speedy trial and invoking the IAD. (R., pp.207-210.) These documents were mailed by Mr. Richardson, while he was in prison, to the prosecutor's office and filed by the court. (R., pp.207-210.) Thus, on February 2, 2015, both the court and the prosecutor's office had all of the information necessary under the IAD to address Mr. Richardson's request to have his Nez Perce County charges resolved. While this information was submitted by Mr. Richardson and not the Terre Haute FCI Warden's office, proper information was conveyed to the correct parties. The State did not claim it lacked notice that Mr. Richardson wanted to resolve the Nez Perce County charges, that it had no idea where Mr. Richardson was being held in prison in Indiana, the length of his Indiana prison sentence, his parole eligibility, or good time/credit for time served; rather, the State only claimed that it lacked receipt of proper forms, which it received July 21, 2015. (R., pp.219-228.)

Because of Mr. Richardson's substantial compliance with the IAD, as well as both the prosecutor's and the court's actual knowledge of Mr. Richardson's desire to resolve the outstanding warrant/detainer, the triggering date for the 180-day time limit should commence on the date Mr. Richardson's request for disposition was received by to the Nez Perce County Prosecutor's office and the Nez Perce County Court Clerk's office, as evidenced by the certified mail receipts: February 2, 2014. As of this date, Mr. Richardson had provided the prosecutor's office and the court clerk's office with all

relevant and necessary information under the IAD to permit the State to secure his return to Idaho.

The State's failure to bring Mr. Richardson to trial within 180 days after receipt of Mr. Richardson's request for disposition, requires dismissal of the charges in the instant matter with prejudice. Mr. Richardson asks this Court to vacate the district court's order denying his motion to dismiss and remand his case to the district court for the entry of an order dismissing the instant matter with prejudice.

III.

The District Court Erred In Admitting Evidence Of Mr. Richardson's Prior Bad Acts

A. Introduction

At trial, through the testimony of Detective Dammon, the jury was told that Detective Dammon became involved in the case because he heard that Mr. Richardson was involved in the distribution of controlled substances. Mr. Richardson asserts that district court erroneously admitted the hearsay statement without analyzing the prejudicial nature of the statement and failed to address the I.R.E. 404(b) violation.

The district court found that testimony of prior alleged drug sales by Mr. Richardson was "provided only to show the foundation for what the officer did" and "not for the truth of the matter of what's been said by the out-of-court statement." (Trial Tr., p.120, Ls.8-12.) However, this testimony was not foundational, but was evidence demonstrating only Mr. Richardson's propensity to commit crimes. Further, the district court erred in failing to consider the prejudicial effect of such information versus any probative value pursuant to I.R.E. 403.

Finally, the district court erred when it admitted the State's evidence in absence of any showing of good cause that would excuse the State's failure to timely provide and serve notice of its intent to introduce prior bad acts evidence at trial.

B. Standard Of Review

Upon review of the district court's determination to admit prior bad acts evidence pursuant to I.R.E. 404(b), this Court reviews both whether the evidence admitted was relevant to a material and disputed issue regarding the crime charged, other than propensity, and whether the probative value of the evidence is outweighed by the danger of unfair prejudice to the defendant. *State v. Field*, 144 Idaho 559, 569, 165 P.3d 273, 283 (2007). This Court generally reviews the district court's decision whether to admit prior bad acts evidence under I.R.E. 404(b) for an abuse of discretion. *See, e.g., State v. Grist*, 147 Idaho 49, 51, 205 P.3d 1185, 1187 (2009). Similarly, the district court's determination as to whether to admit or to exclude evidence based upon the potential for prejudice of that evidence under I.R.E. 403 is likewise reviewed by this Court for an abuse of discretion. *State v. Johnson*, 148 Idaho 664, 667, 227 P.3d 918, 921 (2010). Three pertinent considerations are attendant upon review for an abuse of discretion: (1) whether the district court correctly perceived the issue as an issue of discretion; (2) whether the district court acted in accordance with applicable legal standards and within the proper bounds of its discretion; and (3) whether the district court reached its decision through an exercise of reason. *Id*.

However, the relevance of evidence is a question of law and therefore this Court reviews the district court's determination that evidence is relevant *de novo*. *State v. Raudebaugh*, 124 Idaho 758, 764 (1993).

C. The District Court Erred When It Admitted Testimony Of A Prior Bad Act Against Mr. Richardson Because The State Failed To Provide Timely Notice Of Its Intent To Introduce This Evidence; Because This Evidence Was Not Relevant To Any Material Issues At Trial, Other Than Propensity; And Because The Evidence Was More Prejudicial Than Probative

Mr. Richardson asserts that the district court failed to act in accordance with applicable legal standards when it allowed Detective Dammon to testify to allegations that Mr. Richardson sold controlled substances in the past, as this evidence was irrelevant to the issues at trial and should have been excluded pursuant to I.R.E. 403 and 404(b).

"As with the admissibility of any piece of evidence, where the probative value of the statement[s] is substantially outweighed by the danger of unfair prejudice . . . this evidence should be excluded." *State v. Goodrich*, 97 Idaho 472, 477 (1976). This requires an analysis of whether the audio recording should have been excluded under Idaho Rule of Evidence 403, which allows for the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice." See I.R.E. 403. Under I.R.E. 403, relevant evidence can be excluded by the district court if, *inter alia*, the probative value of that evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, danger of misleading the jury, or if the evidence would involve needless presentation of cumulative evidence. *State v. Tapia*, 127 Idaho 249, 254 (1995). "The trial judge, in determining probative worth, focuses upon the degree of relevance and materiality of the evidence and the need for it on the issue on which it is to be introduced." *Davidson v. Beco Corp*., 114 Idaho 107, 110 (1987). To some extent, all probative evidence is prejudicial. *State v. Gauna*, 117 Idaho 83, 88 (Ct. App. 1989). The question is whether that prejudice is unfair; whether

it harms the defendant because it is so inflammatory that it would lead the jury to convict regardless of other facts presented. *Id*. This inquiry does not center on "whether the evidence is harmful to the strategy of the party opposing its introduction," but on whether the evidence "invites inordinate appeal to lines of reasoning outside the evidence or emotion which are irrelevant to the decision making process." *State v. Rhoades*, 119 Idaho 594, 604 (1991).

1. The District Court Erred In Admitting *Res Gestae* Evidence

The State argued that the testimony was "not being used to show the truth of the matter asserted; it's just being used to show the effect it had on this listener," and the district court admitted the testimony "only to show the foundation for what the officer did." (Trial Tr., p.120, Ls.1-12.) However, Mr. Richardson submits that the district court's basis in admitting the evidence could be interpreted as *res gestae*. The district court's discussion did not expressly inform the parties it was straying from the State's proposed basis for admission and admitting the evidence under a different Rule 404(b) exception. (*See* Trial Tr. p.120, Ls.7-12.) Absent an express ruling by the district court, it is reasonable to interpret the district court's ruling as admitting the evidence as *res gestae*.

The principle of *res gestae* does not provide a separate, independent basis to admit evidence apart from the Idaho Rules of Evidence. "In 1985, the Idaho Rules of Evidence were adopted which established that all relevant evidence is admissible, unless otherwise provided by the Idaho Rules of Evidence or other rules for the courts of Idaho." *State v. Meister*, 148 Idaho 236, 240 (2009) (footnote omitted) (citing I.R.E. 402). "[T]he Rules of Evidence generally govern the admission of *all evidence* in the

courts of this State." *Id.* Since the Rules control, the concept of *res gestae* does not provide a mechanism to admit evidence outside the confines of the Rules. *Res gestae* evidence is still subject to the Rules' admissibility requirements.

Res gestae is a "concept[ ] of relevance. . . . In essence, [it is] shorthand to explain why certain evidence is relevant." *State v. Sams*, 160 Idaho 917, 919 (Ct. App. 2016); *see also State v. Alvord*, 47 Idaho 162, 272 P. 1010, 1012 (1928) ("This evidence must be justified, if at all, by its relevancy."). "*Res gestae* is defined in part as: 'The whole of the transaction under investigation and every part of it.'" *State v. Blackstead*, 126 Idaho 14, 17 (Ct. App. 1994) (quoting BLACK'S LAW DICTIONARY 1305 (6th ed. 1990)). "*Res gestae* refers to other acts that occur during the commission of or in close temporal proximity to the charged offense which must be described to 'complete the story of the crime on trial by placing it in the context of nearby and nearly contemporaneous happenings.'" *Id.* at 18 (quoting 1 KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 190, at 799 (John W. Strong, ed., 4th ed. 1992)). Hence, evidence that is not strictly probative of the crime charged, but which is "'inseparably connected to the chain of events of which the act charged in the information is a part,'" may be admissible as *res gestae*. *State v. Izatt*, 96 Idaho 667, 670 (1975) (quoting *Monge v. People*, 406 P.2d 674, 678 (Colo. 1965)); *see also State v. Miller*, 157 Idaho 838, 842 (Ct. App. 2014) (courts can sometimes admit "evidence of events that are not, strictly speaking, part of the charged criminal episode in order to give the jury a 'complete story' if exclusion of the evidence could result in jury confusion or misleading inferences"). In sum, *res gestae* is simply another way to describe relevant evidence; it does not create a new exception for the admissibility of evidence.

Since *res gestae* evidence refers to other acts than the charged offense, its admissibility is often curbed by the limitations in Rule 404(b). Rule 404(b) "prohibits introduction of evidence of acts other than the crime for which a defendant is charged if its probative value is entirely dependent upon its tendency to demonstrate the defendant's propensity to engage in such behavior." *Sams*, 160 Idaho at 919. The Rule "is principally designed to protect against admission of purely propensity evidence." *Id.* at 919–20. Of course, evidence of other crimes, wrongs, or acts may be admissible for "other purposes" as listed in Rule 404(b), ch as knowledge or plan. I.R.E. 404(b); *Sams*, 160 Idaho at 919; *see also Blackstead*, 126 Idaho at 18 (noting that the enumerated "other purposes" for admission of Rule 404(b) evidence is not "exhaustive"). In this respect, *res gestae* is essentially "an exception to the general prohibition against the use of other misconduct evidence." *Blackstead*, 126 Idaho at 17–18. This exception, however, applies "only where the charged act and the uncharged act are *so inseparably connected* that the jury cannot be given a rational and complete presentation of the alleged crime without reference to the uncharged misconduct." *Id.* at 19 (emphasis added).

Under the *res gestae* exception or any other exception to Rule 404(b), the evidence must be "relevant as a matter of law to an issue other than the defendant's character or criminal propensity." *State v. Ehrlick*, 158 Idaho 900, 913 (2015) (quoting *State v. Joy*, 155 Idaho 1, 8 (2013)); *see also* I.R.E. 402 (irrelevant evidence is inadmissible).

Recently, the Idaho Supreme Court held that *res gestae* could not be used to admit propensity evidence. *State v. Kravolec*. No. 44250, 2017 Opinion No. 3 (Jan. 23,

2017). In *Kralovec*, the Court "decline[d] to perpetrate the use of the *res gestae* doctrine in Idaho," and held "that evidence previously considered admissible as *res gestae* is only admissible if it meets the criteria established by the Idaho Rules of Evidence." *Id*. at 6-7. Although the Court discussed *res gestae* in the context of hearsay, its decision to disavow the principle of *res gestae* generally supports Mr. Richardson's argument that the evidence was not admissible because it was not relevant and was not necessary to give the jury the complete story, that is, "to show the foundation for what the officer did." (Trial Tr., p.120, Ls.7-10.)

In Mr. Richardson's case, during the State's direct examination of its witness, the prosecutor elicited from Officer Dammon prohibited testimony of Mr. Richardson's prior bad acts. The prosecutor inquired regarding how the detective became involved in the investigation of Mr. Richardson:

Q. How did you become involved with that case?

A. I was provided information from a confidential informant.

DEFENSE: Objection. That would be hearsay. I want to get it before he blurts it out.

THE COURT: Well, it's not currently hearsay, so I'm going to overrule the objection.

PROSECUTOR:

Q. So how -- how did you become involved on that day?

A. I was provided information from a confidential informant about a Kyle Richardson being involved in the distribution --

DEFENSE: Objection.

THE WITNESS: -- of controlled substances.

DEFENSE: It's hearsay.

PROSECUTOR: May I respond?

DEFENSE: More than that, it's a violation of 404(b).

THE COURT: Mr. Coleman?

PROSECUTOR: Your Honor, this isn't hearsay. It's being used to show -- it's not being used to show the truth of the matter asserted; it's just being used to show the effect it had on this listener in terms of what he did with his investigation, the next step.

THE COURT: Well, I'm going to allow it. It's foundational. The jury is instructed that this is information being provided only to show the foundation for what the officer did. It's not for the truth of the matter of what's been said by the out-of-court statement.

(Trial Tr., p.119, L.3 – p.120, L.12.) Whether or not the State knew it was soliciting an answer containing information as to a prior bad act, Detective Dammon's actions are imputed to the State. *State v. Parker*, 157 Idaho 132, 147 (2014); *State v. Ellington*, 151 Idaho 53, 61 (2011). In overruling Mr. Richardson's objection, the district court never addressed the lack of prior notice by the State. (Trial Tr., p.120, Ls.7-12.)

The prosecutor argued that the testimony was not hearsay as it was only being used to show the effect on the listener—what prompted the next step of the investigation; however, it was not necessary for the State to establish why Detective Dammon began investigating Mr. Richardson. This information had no probative value in addition to being inflammatory. Further, it was irrelevant. In *State v. Parker*, 157 Idaho 132, 145 (2014), the Idaho Supreme Court recognized that evidence offered to show "the effect on the listener" is generally not relevant, and "is often used as a ruse to put inadmissible evidence before the jury improperly." Idaho cases indicate that, where evidence tends to establish why someone other than the defendant took an action that

is merely incidental to the charged offense, this evidence is not relevant because it is not of consequence to determining whether the defendant's guilt is more or less likely. *See State v. Field*, 144 Idaho 559, 567 (2007). In this case, whether Detective Dammon began investigating the case because he heard that Mr. Richardson had previously been involved in the distribution of controlled substances does not make it more or less likely that Mr. Richardson sold a CI methamphetamine at a later date. And the only manner in which any such inference could arise would be if the inference of criminal propensity were embraced, i.e., if the fact-finder were to assume that Mr. Richardson had sold drugs in the past and therefore was more likely to have done so on the charged occasion.

"Under I.R.E. 404(b), evidence of other crimes, wrongs, or acts is not admissible to show a defendant's criminal propensity." *Johnson*, 148 Idaho at 667, 227 P.3d at 921. Such evidence may, however, be admissible for a non-propensity or character purpose so long as the prosecution provides timely notice of its intent to use such evidence. *Id*. In this case, the evidence proffered by the State of prior alleged drug distribution by Mr. Richardson lacked both timely notice of its intended use by the State and relevance to any purpose other than propensity, and the error was not harmless.

2. The State Failed To Provide Timely Notice Of Its Intent To Use I.R.E. 404(b) Propensity Evidence

Under I.R.E. 404(b), the State may be able to introduce other-acts evidence against a defendant if, *inter alia*, the State files and serves notice of its intent to introduce such evidence reasonably in advance of trial, or during trial if the district court

excuses the lack of such notice upon a showing of good cause for the failure to provide such notice. I.R.E. 404(b).

The Idaho Supreme Court has addressed the practical consequences for the State's failure to provide timely notice of its intent to introduce prior bad acts evidence at trial. *See State v. Sheldon*, 145 Idaho 225 (2008). In *Sheldon*, the State elicited evidence at trial regarding allegations that the defendant had made statements admitting that he had previously engaged in drug sales. *Id*. at 227. In reviewing whether the admission of the prior bad acts evidence was error in light of the State's failure to file timely notice of this evidence, the *Sheldon* Court held that compliance with the notice requirement of I.R.E. 404(b) is mandatory. *Id*. at 230-231. The *Sheldon* Court further concluded that, because the State failed to comply with the notice provisions contained in I.R.E. 404(b), the State's prior bad acts evidence was inadmissible. *Id*. As the introduction of this evidence was highly prejudicial to the defendant, and because such evidence also likely caught defense counsel off-guard when the district court permitted its introduction, the *Sheldon* Court vacated the defendant's conviction for trafficking in methamphetamine. *Id*.

This Court should do the same. The State in this case failed to provide notice of its intent to admit evidence of uncharged acts "reasonably in advance of trial." In fact, the State did not provide *any* notice of its intent to admit this evidence. Despite this, the prosecution elicited information from Detective Dammon that he became involved in the

case because he heard that Mr. Richardson had been involved in the distribution of controlled substances in the past.[8] (Trial Tr., p.119, Ls.14-20.)

As such, the district court did not find good cause that would excuse the untimeliness. The lack of notice, coupled with the lack of any discernible specifics as to where and when the alleged transaction(s) took place, deprived Mr. Richardson of any ability to defend against these allegations. In light of this, the district court erred when it admitted evidence that he had been involved in controlled substance distributions in the past.

3. The District Court Erred In Admitting Evidence Of Prior Drug Transactions By Mr. Richardson Because This Evidence Was Not Relevant To Any Material Issue At Trial Other Than Propensity And Because The Potential Prejudice Of This Evidence Substantially Outweighed Any Probative Value That The Evidence May Have Had

In addition to being barred by the failure to give timely notice, Mr. Richardson further asserts that the district court's admission at trial of allegations of prior drug transactions involving Mr. Richardson was error because this evidence was not relevant for any admissible purpose, and because the prejudice of this evidence substantially outweighed any probative value.

As a general rule, relevant evidence is admissible at trial and evidence that is not relevant is not admissible at trial. *See* I.R.E. 402. Relevant evidence is defined as evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it

[8] In later questioning, the prosecutor again appeared to be trying to elicit improper I.R.E. 404(b) evidence where, after the witness identified Mr. Richardson, the State asked him, "Do you know how many times, rough estimate, you spoke with Kyle Richardson prior to any of this investigation?" (Trial Tr., p.121, L.24 – p.122, L.1.)

would be without the evidence." I.R.E. 401; *State v. Erickson*, 148 Idaho 679, 682 (Ct. App. 2010). "As with the admissibility of any piece of evidence, where the probative value of the statement[s] is substantially outweighed by the danger of unfair prejudice . . . this evidence should be excluded." *State v. Goodrich*, 97 Idaho 472, 477 (1976).

In *State v. Naranjo*, 152 Idaho 134 (Ct. App. 2011), the police were working with an informant who believed that she could get the defendant to sell her drugs based upon the fact that he had allegedly sold her drugs on prior occasions. *Id*. at 136. At trial, the court initially granted the defendant's motion in limine seeking to exclude mention of prior alleged drug sales pursuant to Rule 404(b). *Id*. at 139-40. However, the State elicited testimony at trial of the very type that was found to be inadmissible – testimony from the informant that the defendant had sold her drugs in the past. *Id*. at 140. The justification proffered by the State was that this evidence was admissible to inform the jury why the CI contacted the defendant to ask him to buy methamphetamine. *Id*. at 141. The Idaho Court of Appeals held that prior alleged drug transactions between an informant and the defendant are not admissible to demonstrate why the informant targeted the defendant as part of his or her work with law enforcement. *Id*. at 142. Because the facts in *Naranjo* are highly similar to the facts of this case, a similar result is dictated.

Given that the evidence of prior alleged drug sales between the CI and Mr. Richardson was not relevant to the charged offense for any purpose other than to demonstrate propensity, the district court also should have excluded this evidence on the basis that the potential for prejudice of the allegations that Mr. Richardson had sold drugs in the past substantially outweighed any probative value of this evidence. *See*

I.R.E. 403. Establishing why it is that the CI may have formed the belief that Mr. Richardson might agree to sell him methamphetamine is wholly irrelevant to the issue at trial of whether that sale eventually did occur and was not necessary for the complete story of the actual transaction charged. As in *Naranjo*, the State's evidence of general allegations that Mr. Richardson had sold drugs on undisclosed occasions to the CI served no purpose other than to place Mr. Richardson's propensity to commit drug offenses in front of the jury. Thus, admission of this evidence tended to work great prejudice on Mr. Richardson's case, as this evidence necessarily would tend to imply that Mr. Richardson had a propensity to commit offenses like the ones charged in this case. This prejudice was amplified by the lack of notice that the State would be eliciting testimony of this nature against Mr. Richardson, thus effectively defeating his ability to investigate and prepare a defense against the assertions that he had engaged in drug sales with the CI in the past.

In sum, the evidence alleging prior uncharged drug transactions by Mr. Richardson was not relevant to his underlying guilt of the charged offense, nor was it necessary in order to provide the jury with a complete story of the charge. This evidence depicted Mr. Richardson as a person with a propensity to commit the charged offense in the minds of the jury. The total lack of disclosure by the State, coupled with the extremely general nature of the allegation, precluded Mr. Richardson from being able to provide a defense against the assertion that he had distributed controlled substances in the past. The admission of this evidence was improper, and it was not harmless.

IV.

The District Court Abused Its Discretion When It Ordered Mr. Richardson To Pay Restitution In The Absence Of Substantial Evidence To Support Such An Award

A. Introduction

Mr. Richardson asserts that, by ordering restitution for buy money and for the work performed by Idaho State Police personnel in the absence of substantial evidence to support such an award, the district court abused its discretion because, in doing so, it failed to act consistently with applicable legal standards and failed to reach its decision by an exercise of reason.

B. Standard Of Review

A trial court's decision to order restitution is discretionary, and "[a]n abuse of discretion may be shown if the order of restitution was the result of arbitrary action rather than logical application of the proper [statutory] factors . . . ." *State v. Richmond*, 137 Idaho 35, 37 (Ct. App. 2002) (citation omitted). In reviewing for an abuse of discretion, an appellate court "must determine whether the trial court: (1) correctly perceived the issue as one involving the exercise of discretion; (2) acted within the outer boundaries of its discretion and consistently with any legal standards applicable to specific choices it had; and (3) reached its decision by an exercise of reason." *Id.* (citation omitted).

C. The District Court Abused Its Discretion When It Ordered Mr. Richardson To Pay Restitution In The Absence Of Substantial Evidence To Support Such An Award

Mr. Richardson asserts that the district court abused its discretion in failing to act within the outer boundaries of its discretion and consistently with any legal standards

applicable to specific choices it had, and failing to reach its decision by an exercise of reason, because the restitution award was not supported by substantial, competent evidence. The district court awarded restitution to the ISP despite the fact that ISP lab employee David Sincerbeaux never verified his lodging/travel expenses or his salary and hours worked. In fact, Mr. Sincerbeaux did not testify at all at the restitution hearing and the State did not offer a sworn statement containing the information. Further, the witness called at the restitution hearing lacked direct knowledge of the CI's payment of $300.00 to Mr. Richardson. The prosecutor's request in this case, and thus the district court's order which granted that request in full, is unsupported by the evidence.

The State sought restitution under the Controlled Substances Act, codified as I.C. § 37-2732(k). (5/19/16 Tr., p.18, Ls.18-23; Augmentation, p.4.) Idaho Code § 37-2732(k) provides, in relevant part:

> Upon conviction of a felony or misdemeanor violation under this chapter . . . the court may order restitution for costs incurred by law enforcement agencies in investigating the violation. Law enforcement agencies shall include, but not be limited to, the Idaho state police, county and city law enforcement agencies, the office of the attorney general and county and city prosecuting attorney offices. Costs shall include, but not be limited to, those incurred for the purchase of evidence, travel and per diem for law enforcement officers and witnesses throughout the course of the investigation, hearings and trials, and any other investigative or prosecution expenses actually incurred, including regular salaries of employees.

I.C. § 37-2732(k).

In light of the lack of "specific guidance regarding the nature of a restitution award or the procedure to obtain such an award" under I.C. § 37-2732(k), the Idaho Supreme Court considers the general restitution statute, I.C. § 19-5304. *State v. Gomez*, 153 Idaho 253, 258 (2012). Pursuant to I.C. § 19-5304, courts may order

restitution in a separate written order, that is, the court can enter essentially a civil judgment for restitution against the defendant. *State v. McCool*, 139 Idaho 804, 806 (2004). However, "restitution under section 37-2732(k) must be based on a preponderance of the evidence, and an award of restitution will not be disturbed if supported by substantial evidence." *State v. Cunningham*, No. 44176, 2017 WL 750590, *3 (Feb. 27, 2017) (not yet final); *State v. Weaver*, 158 Idaho 167, 170 (Ct. App. 2014).

In *Cunningham*, the Idaho Supreme Court addressed what constitutes "substantial evidence." *Cunningham*, 2017 WL 750590 (Feb. 27, 2017). The *Cunningham* Court addressed the discretionary nature of restitution under § 37-2732(k) and the fact that a court may only order restitution "to the State for prosecution expenses '*actually incurred*.'" *Cunningham*, at *2 (quoting I.C. § 37-2732(k)) (emphasis in original). In *Cunningham*, the only evidence supporting the restitution award was a Statement of Costs that did not contain itemized time entries explaining the tasks performed or the expenditures made in that case, and the signature on the form was not notarized or otherwise certified as correct. *Cunningham*, at *2. The Court held that the restitution award was not supported by evidence, because the Statement of Costs, an unsworn representation, was not "substantial evidence" upon which restitution pursuant to § 37-2732(k) could be based. *Id.* at *3. The Court vacated the restitution award and remanded the case for further proceedings, holding "[a]t a minimum, measuring up to section 37-2732(k)'s burden to prove expenses actually incurred will generally require sworn statements that delineate the time spent performing specific tasks." *Id*. at *4.

In Mr. Richardson's case, the State requested restitution for the buy money the confidential informant gave Mr. Richardson, the cost of testing the drugs, and the costs of ISP employee David Sincerbeaux travel and time testifying. (Augmentation, pp.4-8.) The State submitted a restitution request from the Lewiston Police Department detailing four payments on four different dates for a total dollar amount of $2,100.00. (Augmentation, p.4.) The State also submitted an unserved trial subpoena for David C. Sincerbeaux (Augmentation, p.5) and a restitution letter requesting 5.5 hours at a rate of $37.32 per hour and travel expenses of $133.20, for a total of $338.46 (Augmentation, p.6). The document did not identify a specific ISP employee, but was signed by Anne Nord, a Laboratory Manager, and was not notarized. *Id*.

Mr. Richardson objected to restitution, and the court held a restitution hearing. (5/19/16 Tr.) At the restitution hearing, the State asked the district court to order the ISP be reimbursed $638.46 for travel expenses and lab fees. (5/19/16 Tr., p.12, L.25 – p.13, L.5.) The State submitted personnel and travel costs in the amount of $338.46. (Augmentation, pp.5-6.) However, the ISP employee, David Sincerbeaux, who had purportedly done the work for which the prosecutor was seeking reimbursement, did not prepare an affidavit or appear at the restitution hearing. (5/19/16 Tr.)

After the prosecutor called Officer Dammon and questioned him about the restitution request for $2,100 for buy money, defense counsel inquired:

> Q. Okay. And then in terms of charges for Mr. Sincerbeaux from the state lab, you don't really have any knowledge of any of that stuff, do you, other than the fact that he showed up in court here?
>
> A. That's correct.
>
> . . .

> Q. But you don't have any knowledge of Mr. Sincerbeaux's -- how those charges came about? You just know they're in your file?
>
> A. I'm not the one that requested restitution for Mr. Sincerbeaux. I have no knowledge of that.

(5/19/16 Tr., p.20, L.4 - p.21, L.17.) Ultimately, Officer Dammon did not have any knowledge of Mr. Sincerbeaux's wages or expenses. In fact, the district court had to refer back to the trial testimony of Mr. Sincerbeaux in order to reach a conclusion that restitution was appropriate. (Augmentation, pp.10-11.) Although David Sincerbeax testified at the trial, he was not asked about this document or the amount of time he had spent on the case. (*See* Trial Tr., p.251, L.4 – p.273, L.9.) In ordering restitution, the district court noted that the defendant had challenged the restitution claim with respect to Sincerbeaux's testimony, but concluded "there was no evidence that the request was inappropriate." (Augmentation, p.11.) The district court awarded restitution in the amount of $2,738.46, which included the $638.46 requested for the ISP. (Augmentation, pp.9-16.)

Mr. Richardson submits that this is error because there is absolutely no evidence in the record as to how the prosecutor calculated this hourly rate or these expenses. The only evidence submitted during the restitution hearing was State's Exhibit C, which simply states that personnel spent 5.5 hours at a rate of $37.32 per hour and that total travel expenses (per diem, lodging, transportation) were $133.20—there is nothing in that exhibit which explains that hourly rate or what the costs were for. (Augmentation, p.6.) Thus, there is no evidence in the record that the restitution request reflects the State's actual costs. Mr. Richardson asserts that the expenses and the hourly rate are not supported by substantial, competent evidence.

Further, by holding "there was no evidence that the request was inappropriate" (Augmentation, p.3), the district court effectively changed the State's burden to prove restitution by a preponderance of the evidence to an affirmative burden on the defense to disprove the State's request. However, the burden is on the State to establish, by a preponderance of the evidence, that the amount requested was supported by substantial and competent evidence. Thus, the district court erred by finding otherwise and awarding restitution.

Additionally, although State's Exhibit C, the ISP Controlled Substance Restitution, was admitted at the restitution hearing, the witness who testified only had direct knowledge of the payment of $1,800 worth of "buy money" and was not present for the $300 purportedly spent on September 23, 2011. (5/19/16 Tr., p.13, L.13 – p.14, L.11; p.16, L.16 – p.17, L.24; p.19, Ls.13-25.) Thus, no witness testified who had first-hand knowledge of the CI paying Mr. Richardson $300. (5/19/16 Tr.)

Since the State did not present substantial and competent evidence that the ISP expenses were the result of the criminal conduct, the restitution order is not based on sufficient evidence. As such, the restitution award should be vacated.

CONCLUSION

Mr. Richardson respectfully requests that this Court vacate the district court's order denying his motion to dismiss and remand his case to the district court for the entry of an order dismissing the instant matter with prejudice. Alternatively, Mr. Richardson respectfully requests that this Court vacate his convictions and remand to the district court for a new trial. Mr. Richardson requests that the restitution award be vacated.

DATED this 16th day of March, 2016.

_____/s/_____
SALLY J. COOLEY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 16th day of March, 2016, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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