1-23-2018

State v. Cunningham Appellant's Brief Dckt. 45253

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 45253**
Plaintiff-Respondent,	)	
	)	**ADA COUNTY NO. CR-FE-2014-5157**
v.	)	
	)	
JEREMY YORK CUNNINGHAM,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

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

HONORABLE LYNN G. NORTON
District Judge

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STATEMENT OF THE CASE

Nature of the Case

The Idaho Supreme Court remanded this case after holding the initial order for restitution was not supported by the requisite substantial evidence. On remand, the district court erred by entering a new restitution award which was based on essentially the same insufficient "evidence" as its initial order.

Specifically, the district court relied on a document which purported to reveal the amount of time each attorney worked on the case even though the entries in that document were not sworn or certified true by the people making the entries. In fact, the district court erred by allowing that document, as well as a second document, into evidence in the first place because they had both been prepared by the prosecutor's office in anticipation of the restitution proceedings, which the Idaho Supreme Court has clearly held makes them inadmissible under the hearsay rules. Finally, the State did not provide the number it was using for the prosecutors' actual pay rates. Thus, there was no evidence to show its calculated total represented its actual loss. That lack of evidence is especially troubling since the total it requested indicates the numbers it was using for the prosecutors' pay rates were improperly inflated.

Since the district court made the same error it did the last time around, this Court should vacate the order of restitution again. However, as the State has now had two opportunities to try to prove its actual loss, and has failed both times, this Court should not remand the case to give the State a third bite at the apple.

Statement of the Facts and Course of Proceedings

Jeremy Cunningham was found guilty of possession of a controlled substance by a jury. (42585 R., p.87.)[1] In subsequent restitution proceedings, the prosecutor presented an unsworn Statement of Costs which requested $2,240 in restitution for prosecution costs for 16 hours worked at a pay rate of $140 per hour. (42585 Exh., p.7; *see also* 42585 Tr., p.4, Ls.17-21.) Mr. Cunningham objected to that request for restitution, arguing, for example, that the requested rate of pay did not reflect the prosecutor's regular salary. (42585 Tr., p.7, L.11 - p.8, L.21.) The district court rejected his arguments and ordered him to pay restitution per the prosecutor's representations.[2] (42585 Tr., p.8, L.22 - p.10, L.19; 42585 R., pp.98-99.) Mr. Cunningham timely appealed. (*See* 42585 R., p.92.)

In that appeal, Mr. Cunningham argued the district court had erred in ordering that restitution because there was not substantial evidence to support the order. The Idaho Supreme Court agreed. *State v. Cunningham*, 161 Idaho 698 (2017). It expressly held that "unsworn representations, even by an officer of the court, do not constitute 'substantial evidence' upon which restitution under section 37-2732(k) may be based." *Id*. at 702. Thus, it explained a form prepared by the prosecutor which merely lists the total hours worked, the applicable pay rate, and calculates a sum total, but which does not provide certified accountings for either number, does not meet the State's burden of proof. *Id*. at 700.

[1] The Idaho Supreme Court ordered the record in this case be supplemented with the record, exhibits, and transcripts prepared in Mr. Cunningham's previous appeal, Docket Number 42585. (R., p.2.) References to the documents from that record will be identified with the docket number. For example, a citation to that record will be cited as "42585 R."

[2] The district court also ordered $100 in restitution for the lab testing to which Mr. Cunningham did not object. (*See* 42585 R., p.99; 42585 Tr., p.6, Ls.13-16.)

The Supreme Court also provided guidance for the ensuing remand. Specifically, it noted that I.C. § 37-2732(k), "by its plain terms, grants discretion to award restitution to the State for prosecution expenses '*actually incurred*.'" *Id*. (emphasis from original). That meant, the Court explained, that the restitution award could not be based on a determination of "reasonable" attorney fees, but rather, the expenses actually incurred as a result of this case. *Id*. To that point, it noted the "burden to prove expenses actually incurred will generally require sworn statements that delineate the time spent performing specific tasks" at a minimum. *Id*.

On remand, the district court held a new restitution hearing. The State presented one witness at that hearing – Kylie Bolland, an administrative assistant in the prosecutor's office who collected various information to calculate the amount of restitution to be requested. (*See generally* Tr.) Specifically, she relied on "the purple sheet," on which various prosecutors purportedly indicated the amount of time they had each spent on various tasks associated with the case. (Tr., p.4, L.12 - p.6, L.4; *see* Exh., p.2.) There is no indication on the purple sheet that the entries therein are certified accurate. (*See generally* Exh., p.2.)

Mr. Cunningham objected to Ms. Bolland's testimony based on the purple sheet, as well as the purple sheet itself, arguing that the State had not laid foundation as to Ms. Bolland's knowledge about the accuracy of the information contained in the purple sheet. (Tr., p.6, Ls.11-14.) The prosecutor requested leave to inquire further, and Ms. Bolland testified that the purple sheet is a record kept by the prosecutor's office in all such cases. (Tr., p.7, Ls.1-6.) Mr. Cunningham renewed his objection. (Tr., p.7, Ls.12-13.) The district court overruled that objection, admitting the purple sheet under I.R.E. 803(6) as a business record. (Tr., p.7, Ls.14-22.)

Ms. Bolland proceeded to testify that, using the numbers from the purple sheet, and looking up the pay rates for the various prosecutors, she had "do[ne] that math" to calculate the amount of restitution to request in this case. (Tr., p.8, L.9 - p.12, L.1.) During that testimony, the State sought to have Ms. Bolland's affidavit to that effect admitted as evidence. (Tr., p.9, Ls.5-24; *see* Exh., pp.3-4.) Mr. Cunningham raised the same objection he had made to the purple sheet. (Tr., p.10, Ls.1-4.) The district court reviewed the affidavit and concluded it was not a self-authenticating document as to the payroll records themselves, as Ms. Bolland did not purport to be the custodian of those records. (Tr., p.10, Ls.14-25.) However, it ultimately allowed her to testify about her interaction with the payroll records as business records under I.R.E. 803(6) and admitted her affidavit under the same rule. (Tr., p.11, Ls.1-10.) Ms. Bolland never identified what numbers she was using for the pay rates in her calculations. (*See generally* Tr.) However, she testified that, by her calculations, the total restitution to be requested in this case was $906.75. (Tr., p.11, L.24 - p.12, L.1.)

Mr. Cunningham argued the State had failed to meet its burden of proof for several reasons. For example, he argued that Ms. Bolland's affidavit was essentially the same as the Statement of Costs the State had used at the first restitution hearing. (Tr., p.13, Ls.15-16.) He also pointed out that the State had not presented any evidence as to what the prosecutors' regular salaries actually were. (Tr., p.13, Ls.16-17.) He added that, without that information, the State had failed to show that Ms. Bolland's calculations were based on the prosecutors' regular salaries, that they were not improperly inflated by benefits, bonuses, or other additional costs. (Tr., p.13, L.17 - p.14, L.5.) He also argued that the entries in the purple sheet was not sworn, and that there was no other evidence to show that those entries were, in fact, accurate representations of the time worked. (Tr., p.14, Ls.6-12.)

The district court rejected those arguments, concluding that, since Ms. Bolland was testifying under oath, her testimony, based on the documents offered, was sufficient to meet the Supreme Court's instructions and guidance for remand. (Tr., p.16, L.4 - p.17, L.4.) As such, it entered a new order for restitution in the amount of $906.75 and amended the judgment to reflect the new restitution order. (Tr., p.18, Ls.5-7; R., p.26-28, 33-34.)

Mr. Cunningham filed a notice of appeal timely from the amended judgment of conviction. (R., pp.30-31.)

ISSUE

Whether the district court's decision to award restitution after the Idaho Supreme Court remanded this case is still unsupported by the requisite substantial evidence.

ARGUMENT

The District Court's Decision To Award Restitution After The Idaho Supreme Court Remanded This Case Is Still Unsupported By The Requisite Substantial Evidence

A. Standards Of Review

The trial court's decision to admit evidence under a hearsay exception is reviewed for an abuse of discretion. *State v. Fair*, 156 Idaho 431, 433 (Ct. App. 2014). Similarly, the district court's decision to order restitution under I.C. § 37-2732(k) is reviewed for an abuse of discretion. *See State v. Nelson*, 161 Idaho 692, 695 (2017). A district court abuses its discretion when it (1) fails to appreciate the issue as one of discretion, (2) acts beyond the bounds of its discretion or inconsistent with the applicable legal standards, or (3) reaches its discretion without exercising reason. *State v. Hedger*, 115 Idaho 598, 600 (1989).

In this case, the district court's decisions to admit the purple sheet and Ms. Bolland's affidavit were both inconsistent with the applicable legal standards, thus failing the second prong of the *Hedger* test. Its decision to award restitution for the costs of prosecution fails under that same prong, as it is also inconsistent with the applicable legal standards, most notably the Idaho Supreme Court's opinion in the initial appeal in this case.

B. The District Court Erred By Admitting The Purple Sheet And Ms. Bolland's Affidavit Under The Business Records Exception To The Hearsay Rule Because They Were Both Prepared In Anticipation Of Litigation

Statements made out of court are considered hearsay and are not admissible for the truth of the matter asserted unless they fall under one of the specifically-delineated exceptions to the hearsay rule. I.R.E. 801, 802. Since the State is the proponent of all the evidence in this case, it bears the burden of proving the proffered evidence fits under one of those exceptions. *Fair*, 156 Idaho at 434. The purple sheet and Ms. Bolland's affidavit were both prepared out of court.

(*See* Exh., pp.2-4.) As such, both would have to fall under one of the hearsay exceptions to be admissible.[3] Additionally, Ms. Bolland's testimony based on those documents would be improper if the documents themselves were not admissible under those rules. *See* I.R.E. 805 (addressing hearsay within hearsay).

The district court admitted the purple sheet and Ms. Bolland's affidavit under the business records exception. (Tr., p.7, Ls.14-22, p.11, Ls.1-10.) That exception allows documents to be admitted if they keep track of a businesses' records, data, and the like, provided those records are kept in the ordinary course of business. I.R.E. 803(6). However, the Idaho Supreme Court has made it clear that the business records exception does not apply to documents which were prepared by a public office or agency in anticipation of litigation. *State v. Sandoval-Tena*, 138 Idaho 908, 911-12 (2003). The reason for that, the Supreme Court explained, was because the business records exception had to be interpreted alongside the public records exception contained in I.R.E. 803(8). *Sandoval-Tena*, 138 Idaho at 912. The public records

[3] Idaho Rule of Evidence 101(d)(7) provides that the rules of evidence apply in restitution hearings except as provided in I.C. § 19-5304(6). That code section allows a district court in traditional restitution proceedings to consider limited hearsay evidence "as may be contained in the presentence report, victim impact statement or otherwise provided to the court." I.C. § 19-5304(6). Nothing in that code section purports to extend that limited exemption to restitution proceedings under I.C. § 37-2732(k). *See generally* I.C. § 19-5304(6). It does appear that Idaho's courts have ever extended the exception from I.C. § 19-5304(6) in that manner, nor did the State make an argument that it should in response to Mr. Cunningham's hearsay objections below. (*See generally* R., Tr.)

In fact, the Idaho Supreme Court has explained, the plain language of I.C. § 37-2732(k) does not permit the State to use unsworn statements of the kind found in the purple sheet to support a claim for restitution under that code section. *Cunningham*, 161 Idaho at 702. As such, extending the exception in I.C. § 19-5304(6) beyond the traditional restitution scenario it specifically addresses would be contradictory to the plain language of I.C. § 37-2732(k). *See also Local 1494 of Int'l Ass'n of Firefighters v. City of Couer d'Alene*, 99 Idaho 630, 639-40 (1978) (explaining that, when a statute lists certain things, it excludes other dissimilar things from its scope). Therefore, the applicability of the hearsay rules in this case is governed by I.R.E. 101(d)(7), under which, the hearsay rules apply.

exception allows reports, data, and the like, from a public office or agency to be admitted if they set forth its regularly-conducted and recorded activities. I.R.E. 803(8). However, that rule expressly excludes documents prepared in anticipation of litigation from the scope of that exception. I.R.E. 803(8)(B) ("The following are not within this exception to the hearsay rule: . . . investigative reports prepared by or for a government, a public office or an agency when offered by it in a case in which it is a party.").

The Idaho Supreme Court held that "[t]he effect of exclusion under 803(8) would be meaningless if the report were admissible under the 803(6) business records exception." *Sandoval-Tena*, 138 Idaho 912; *accord State v. Griffith*, 144 Idaho 356, 364 (Ct. App. 2007) (assuming that admitting a public agency's report prepared for trial under the business records exception was error, but finding that error ultimately harmless). Essentially, a record is not prepared in the ordinary course of business if it is prepared in anticipation of litigation, even if such records are made in every case the agency deals with. *See Portfolio Recovery Associates, LLC v. MacDonald*, 162 Idaho 228, ___, 395 P.3d 1261, 1266 (2017) (reiterating that "[t]he general requirement for admission under I.R.E. 803(6) is that the document be produced in the ordinary course of business, at or near the time of occurrence *and* not in anticipation of trial") (internal quotation omitted, emphasis added). Thus, admitting a document as a business record when that document would be inadmissible under the public records exception is error. *Sandoval-Tena*, 138 Idaho at 912.

Ms. Bolland's affidavit was explicitly prepared by the prosecutor's office, which is a public office or agency, in preparation for the restitution proceedings. (Tr., p.4, L.12 - p.5, L.2, p.9, Ls.2-22; *see generally* Exh., pp.3-4.) Therefore, it was inadmissible under I.R.E. 803(8)(B). The purple sheet was also explicitly prepared in preparation for the restitution proceedings by the

prosecutor's office. (Tr., p.4, L.10 - p.5, L.2, p.7, Ls.4-6; *see generally* Exh., p.2.) Therefore, it, too, was inadmissible under I.R.E. 803(8)(B). As a result, the district court erred by overruling Mr. Cunningham's objections to those documents and admitting them under I.R.E. 803(6). *See Sandoval-Tena*, 138 Idaho 912. Because those documents were inadmissible hearsay, the district court also erred by overruling Mr. Cunningham's objection to Ms. Bolland's testimony based on those documents. I.R.E. 805.

The fact that those documents were not admissible is particularly important in this case because the purple sheet was the only source of information the State presented to try to prove the amount of time the prosecutors worked on this case. (*See generally* R., Tr.) Since there needs to be, at a minimum, sworn statements which delineate the time spent performing specific tasks in order to meet the substantial evidence threshold, *Cunningham*, 161 Idaho at 702, the lack of any admissible evidence on that point means the district court's order for restitution is contrary to the Idaho Supreme Court's instructions in its previous opinion in this case. As such, the district court's order for restitution should be vacated.

C. Even If The Purple Sheet Was Admissible Evidence, It Does Not Constitute The Requisite "Substantial Evidence" Under The Idaho Supreme Court's Clear Holding In This Case Because The Entries Therein Were Not Sworn Or Certified True By The Person Making The Entry

The Idaho Supreme Court was clear in its previous opinion in this case about what does and does not constitute substantial evidence in regard to a restitution award: "We therefore hold that the unsworn representations, even by an officer of the court, do not constitute 'substantial evidence' upon which restitution under section 37-2732(k) may be based." *Cunningham*, 161 Idaho at 702. The Supreme Court was particularly critical of the State's attempt to rely on the

prosecutor simply taking unverified numbers and plugging them into a math formula without also providing evidence that the numbers were, themselves, accurate:

> The statement of costs merely identifies the defendant, the case number and the prosecutor, then it states the total number of attorney hours, the hourly rate, and computes the sum total of the request. It does not contain itemized time entries explaining the tasks performed or the expenditures made in the particular case. Although it is signed, the signature does not purport to certify it as correct.

Id. at 700.

When such statements are not sworn or otherwise certified to be true under the penalty of perjury, they are not equivalent to testimony offered under oath at the hearing, and so, do not constitute "evidence." *See, e.g., Rocky Mountain Power v. Jensen*, 154 Idaho 549, 552 (2012); *see also* I.C. § 9-1406 (allowing certified declarations to substitute for affidavits if they conform to certain requirements, none of which are present in the purple sheet). Simply put, "[u]nsworn statements are entitled to no probative weight." *Camp v. Jimenez*, 107 Idaho 878, 882 (Ct. App. 1984). Thus, all the court has to consider when such statements are not sworn or certified are the bare, conclusory allegations of a party in the case, and those are not enough to create a genuine issue of material fact, much less entitle the party to the relief they seek. *Rocky Mountain Power*, 154 Idaho at 552; *Heinze v. Bauer*, 145 Idaho 232, 236 (2008). As a result, "the prosecutor's unsupported representations cannot be relied upon as evidence . . . even under the low evidentiary standards" which exist in restitution proceedings." *State v. Cheeney*, 144 Idaho 294, 299 (Ct. App. 2007).

Furthermore, the State cannot transform such statements into evidence by having someone else testify about the document. "[A]ffidavits of counsel based upon hearsay rather than upon personal knowledge are insufficient to raise genuine issues of material fact." *Camp*, 107 Idaho at 882. That is why the prosecutor cannot simply compile the numbers and testify to

the accuracy of the compilation without an independent certification of the accuracy of the numbers *from the person with knowledge* of the accuracy of those numbers. *Cunningham*, 161 Idaho at 702; *Nelson*, 161 Idaho at 697.

Yet that is exactly what the State did by presenting Ms. Bolland's affidavit and testimony. She could only testify to taking the numbers from the purple sheet, as she had no independent basis to verify the accuracy of those numbers herself. (*See* Tr., p.4, L.12 - p.6, L.4.) The mere fact that the attorney had to approve the entry is not enough. *Cunningham*, 161 Idaho at 702; *Camp*, 107 Idaho at 882. Thus, just like the statement of costs which the Supreme Court criticized in the first appeal, Ms. Bolland's testimony was simply that she had taken the unverified numbers and calculated the sum total to request based on those numbers. (*See* Tr., p.4, L.12 - p.5, L.2.)

Essentially, the only difference between the State's evidence on remand and its evidence at the initial hearing is that Ms. Bolland, rather than the prosecutor, prepared the document and made the calculations. (*Compare* Tr., p.4, L.12 - p.5, L.2, *and* Exh., pp.3-4, *with* 42585 Tr., p.4, Ls.17-21, *and* 42585 Exh., p.7.) The accuracy of the numbers being used still has not been averred or certified, as the Idaho Supreme Court expressly required. *Cunningham*, 161 Idaho at 702. Thus, the "evidence" on which the district court relied on remand is the same "evidence" it improperly used the first time.

The district court's reliance on the same, uncertified information it had improperly used the first time is particularly troubling since, besides clearly holding that sort of evidence is not sufficient to justify a restitution award, the Supreme Court gave an affirmative example of what would be sufficient in its discussion of *State v. Weaver*, 158 Idaho 167 (Ct. App. 2014). *See Cunningham*, 161 Idaho at 701. In *Weaver*, the prosecutor provided a *certified* accounting which

listed both an itemized description of the time spent and the applicable hourly rate, for the district court's consideration. *See id*. (noting that the defendant in *Weaver* had not challenged the propriety of the rate of pay). But rather than follow the example given by the Supreme Court, the district court in this case chose to rely on uncertified information, and it did not even require the State to provide the actual numbers it was using for the pay rates. (*See* Exh., p.2 (providing spaces specifically for listing those pay rates, but which are blank); *see generally* Tr.)

Basically, the district court ordered restitution based only on Ms. Bolland's testimony that she accurately took the unverified numbers from the purple sheet, applied a number from the payroll records which she did not provide to the district court, and calculated a sum total. (Tr., p.4, L.12 - p.5, L.2) That is precisely what the Idaho Supreme Court said it could not do. *Cunningham*, 161 Idaho at 700-02. Since the district court ignored the Supreme Court's instructions and made the same error it did the last time, this Court should vacate its order for restitution again.

D. The State Has Presented No Evidence As To What The Prosecutors' Actual Rates Of Pay Were, And So, There Is Not Substantial Evidence Showing That The Amount Awarded Represents The State's "Actual Loss" Under I.C. § 37-2732(k)

Although Ms. Bolland testified she got the prosecutors' rates of pay from the payroll records, there is no indication in her testimony or the exhibits as to what those numbers actually were. (*See generally* Tr., Exh.) In the first place, the district court concluded Ms. Bolland was not the keeper of the payroll records, and so, could not inherently verify the accuracy of those records. (Tr., p.10, Ls.14-25.) As such, there was no admissible evidence as to what the prosecutors' pay rates were, since Ms. Bolland's bare assertion about her calculations is not substantial evidence of the prosecutor's pay rates. *See Cunningham*, 161 Idaho at 702 ("unsworn representation, even by an officer of the court, do not constitute 'substantial evidence' upon

which restitution under section 37-2732(k) may be based"); *Camp*, 107 Idaho at 882 ("affidavits of counsel based upon hearsay rather than upon personal knowledge are insufficient to raise genuine issues of material fact."). That alone should result in a vacated order. *See Cunningham*, 161 Idaho at 702.

At any rate, Ms. Bolland's testimony that she had "do[ne] the math" is not sufficient evidence to prove the total sum she calculated represents the State's actual losses. She did not, as the Idaho Supreme Court (like so many math teachers) requires, show her work. *See State v. Hurles*, 158 Idaho 569, 577 (2015). In *Hurles*, the State sought certain restitution based on a spreadsheet prepared by a paralegal which collected the allegedly-relevant data and made calculations based on that data. *Id.* The Idaho Supreme Court vacated the portion of the restitution award based on those calculations because "[t]here is no indication in the record as to whether or how the spreadsheet prepared by the Givens Pursley paralegal relates to the [alleged losses]." *Id*. The district court in this case relied on that same sort of conclusory calculation, as all the State provided was an administrative assistant's compilation of allegedly-relevant but unverified data and her calculations based on that data without showing whether or how that data is actually related to the losses claimed.

The State's failure to show its work in this case is particularly problematic under I.C. § 37-2732(k) because that statute only authorizes the State to recover "the costs of prosecution, including regular salaries." By using the term "regular salaries," the plain language of the statute reveals the Legislature limited the scope of the costs the State could recover. *See, e.g., Local 1494 of Int'l Ass'n of Firefighters v. City of Couer d'Alene*, 99 Idaho 630, 639-40 (1978); *compare* I.C. § 59-1302(31) (drawing a distinction between "salary" and "benefits" by

defining "compensation" as "salary and benefits for the professional employee," and "benefits" as "employee insurance, leave and sick benefits").

That limitation is consistent with the purpose of restitution, which is to address only the losses caused by the defendant's criminal conduct, not every out-of-pocket expense potentially linked to the criminal conduct. *See, e.g.*, *State v. Nienburg*, 153 Idaho 491, 495 (Ct. App. 2012). While the cost for the hours the prosecutor actually spent working on this case might be said to be directly attributable to the criminal conduct, the costs for the bonuses, benefits, and such are not paid because the prosecutor worked on this particular case, and so, the latter are not "caused by" the criminal conduct in this case, which means they are not properly included in a restitution order. *State v. Richmond*, 137 Idaho 35, 37 (Ct. App. 2002) (explaining that courts cannot award restitution for losses which are not specifically authorized by the Legislature); *cf. Cunningham*, 161 Idaho at 702 (noting that the statute requires the State to prove the loss it "actually incurred").

In this case, the State's evidence does not show its claim for restitution fits under the scope of I.C. § 37-2732(k). As trial counsel pointed out, without the State showing its work, it has not shown that the pay rates it used represented the prosecutors' regular salaries, as opposed to being inflated by bonuses, benefits, or other additional costs. (Tr., p.13, L.16 - p.14, L.5.) As such, the district court's order, which relies on the State's insufficient showing, is not based on substantial, admissible evidence showing the restitution requested is appropriate under the applicable statute.

In fact, by assessing the numbers the State did provide, it appears its calculations were improperly inflated. For example, taking the total amount requested and dividing by the total number of hours claimed reveals the State's calculations were based on an average pay rate of

$56 per hour for the prosecutors involved.[4] A person making $56 per hour would have a yearly salary of $116,480.[5] For comparison, a magistrate judge was only making $109,300 during the time this case was proceeding, and the district court judge only $114,300.[6] Thus, the State's numbers seem abnormally high. As such, the numbers the State did provide do not appear to reflect the prosecutors' actual regular salaries, and thus, the actual loss suffered by the State in this case. *See* I.C. § 37-2732(k).

Since the State did not present evidence, much less substantial evidence, as to the actual rates of pay, and thus, its actual loss as provided in the applicable statute, the district court's decision to award restitution based on the State's insufficient showing ignores the Idaho Supreme Court clear instructions for the remand. *See Cunningham*, 161 Idaho at 700-02. Therefore, the district court's order should be vacated again.

E. The Proper Remedy Is To Simply Vacate The Restitution Award Without Further Remand

This is the second time the State has failed to present sufficient evidence in support of its claim for restitution in this case. *See Cunningham*, 161 Idaho at 702. In such circumstances, "remanding for a third opportunity would be improper." *Nelson*, 161 Idaho at 697. Therefore,

[4] $906.75 ÷ 16 hours = $56/hour. (*See* Exh., pp.2-4.)
[5] $56/hour * 40 hours/week * 52 weeks/year = $116,480/year.
[6] The statues setting the salary schedule for judges were heavily amended in 2014. Prior to that change, and thus, during the relevant time for this case, the district court judge's salary was statutorily set at $114,300 per year. *See* 2014 Idaho Laws Ch. 291 (amending that language out of I.C. § 59-502(1)). A magistrate who was an attorney was scheduled to make $5,000 less than a district judge. I.C. § 1-2222 (2013), *available at* https://law.justia.com/codes/idaho/2013/title-1/chapter-22/section-1-2222/; *see* 2014 Idaho Laws Ch. 291 (repealing I.C. § 1-2222 and moving the magistrate pay schedule to I.C. § 59-502). Thus, to compute what the magistrate's salary would have been, $114,300 - $5,000 = $109,300.

this Court should, as the Idaho Supreme Court did in *Nelson*, simply vacate the restitution award in this case without remanding it.

CONCLUSION

Mr. Cunningham respectfully requests this Court vacate the restitution order in his case.

DATED this 23rd day of January, 2018.

_____/s/_____
BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 23rd day of January, 2018, 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:

JEREMY YORK CUNNINGHAM
2700 W WYMER STREET
BOISE ID 83705

LYNN G NORTON
DISTRICT COURT JUDGE
E-MAILED BRIEF

BRIAN C MARX
ADA COUNTY PUBLIC DEFENDER
E-MAILED BRIEF

KENNETH K JORGENSEN
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CRIMINAL DIVISION
E-MAILED BRIEF

_____/s/_____
EVAN A. SMITH
Administrative Assistant

BRD/eas