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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	No. 45253
Plaintiff-Respondent,	)	
	)	Ada Co. Case No.
vs.	)	CR-FE-2014-5157
	)	
JEREMY YORK CUNNINGHAM,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

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

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STATEMENT OF THE CASE

Nature of the Case

Jeremy York Cunningham appeals from the second amended judgment and restitution order entered by the district court for possession of a controlled substance. On appeal, Cunningham argues the district court abused its discretion when it admitted documentary evidence during the restitution hearing.

Statement of Facts and Course of Proceedings

A jury found Cunningham guilty of felony possession of a controlled substance. (42585 R., p. 83.[1]) The state sought restitution for prosecution costs pursuant to Idaho Code § 37-2732(k). (42585 10/23/14 Tr., p. 4, L. 17 – p. 5, L. 22; Ex. 1.) In support of its restitution claim the state presented an unsworn statement of costs. (42585 10/23/14 Tr., p. 4, L. 17 – p. 5, L. 22; Ex. 1.) The state also requested $100 in restitution under the Drug Donation Act for lab fees. (42585 10/23/14 Tr., p. 5, L. 23 – p. 6, L. 4.) The district court entered an amended judgment reflecting this restitution award. (42585 R., p. 101.) Cunningham timely appealed. (42585 R., pp. 104-106.)

The Idaho Court of Appeals held that "the district court lacked any evidence to support its restitution award." State v. Cunningham, No. 42585, 2016 WL 800321, at *2 (Idaho Ct. App. Mar. 1, 2016), aff'd, 161 Idaho 698, 390 P.3d 424 (2017). The Court stated that "an unsworn written statement as to the amount of costs and hours spent

---

[1] The Idaho Supreme Court ordered the record in this case be augmented to include the Clerk's Record, Reporters' Transcripts and Exhibits filed in prior appeal No. 42585, State v. Cunningham, Ada County No. CRFE-2014-5157. (R., p. 2.) Citations to documents and transcripts from the prior appeal will be identified as No. 42585.

prosecuting" was not evidence. Id. The Court of Appeals vacated the restitution award. Id. The state sought, and the Supreme Court granted, review. See State v. Cunningham, 161 Idaho 698, 699, 390 P.3d 424, 425 (2017).

On review, the Supreme Court analyzed the language of Idaho Code § 37-2732(k). Id. at 700-701, 390 P.3d at 426-427. The Court then found that the unsworn one-paragraph form submitted by the state was inadequate to support the district court's restitution award. Id. at 700, 390 P.3d at 426. The one-paragraph form was a "boilerplate, fill-in-the-blank-style form" which only stated the total number of hours and rate and did not contain itemized time entries explaining the tasks performed. Id. Nor did the one-paragraph form certify its information as correct. Id.

> The Statement of Costs merely identifies the defendant, the case number, and the prosecutor. It then 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. The Court found that these "unsworn representations" did not constitute substantial evidence upon which restitution may be based. Id. at 428, 390 P.3d at 702. The Court noted, for future guidance, that Idaho Code § 37-2732(k), "by its plain terms, grants discretion to award restitution to the State for prosecution expenses '*actually incurred*.'" Id. (citing I.C. § 37-2732(k) (emphasis in original)). Further, "[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. The Court remanded the case for further proceedings. Id.

On remand the district court held another restitution hearing. (R., pp. 23-25.) The state presented the testimony of Kylie Bolland, an administrative specialist with the Ada County Prosecutor's Office, who handles accounts payable and is in charge of the certificate of records for drug prosecution. (7/7/17 Tr., p. 3, L. 17 – p. 12, L. 1; Exs. 1-2.) Through Ms. Bolland's testimony, the state admitted documents which itemized the time spent by each attorney on specific tasks in the case. (Id.; Exs. 1-2.) Ms. Bolland also testified that she determined, thorough payroll records, the amount it cost the county to pay the attorneys for the specified time. (Id.) Ms. Bolland testified that the total amount of prosecution costs was $906.75. (Id.) Cunningham did not cross-examine Ms. Bolland or present evidence. (7/7/17 Tr., p. 12, Ls. 5-16.)

The district court ruled the state provided substantial evidence and complied with the Idaho Supreme Court's ruling in Cunningham. (7/7/17 Tr., p. 16, L. 4 – p. 18, L. 14.) The district court held, in part:

> In this particular case, we have evidence by way of testimony, as well as by the written certificate of record, that the calculation is true and correct to the best of the information and belief. It is sworn. I do not find that the Supreme Court's decision requires that it actually be sworn by an attorney. Clearly, any custodian of records or competent witness can testify. I do find that the person who reviews the records that were kept in the regular course of business, and these records indicate the amount of time and the type of effort that was expended by each attorney. The testimony was that each one was an attorney. That they were then billed on the actual payroll records of Ada County at the time that the expenses were actually incurred, so I do find that the evidence and testimony is sufficient to show that $906.75 of prosecution costs were actually incurred in this case.

(7/7/17 Tr., p. 16, L. 15 – p. 17, L. 6.) The district court ordered restitution in the amount of $1,006.75, which included the $906.75 in actual prosecution costs plus $100 for lab

costs. (7/7/17 Tr., p. 18, Ls. 5-14; R., pp. 26-28, 33-35.) Cunningham timely appealed. (R., pp. 30-32.)

<u>ISSUE</u>

Cunningham states the issue on appeal as:

> 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.

(Appellant's brief, p. 6.)

The state rephrases the issue as:

Has Cunningham failed to show the district court abused its discretion and applied incorrect legal standards when it admitted documentary evidence at the restitution hearing and based the restitution award on sworn testimony?

ARGUMENT

The District Court Did Not Abuse Its Discretion When It Awarded Restitution Pursuant To Idaho Code § 37-2732(k)

A. Introduction

The district court's restitution order was based upon the sworn testimony of Ms. Bolland and the documents admitted into evidence. (See 7/7/17 Tr., p. 16, L. 4 – p. 18, L. 14; Exs. 1-2.) Contrary to Cunningham's argument on appeal, the district court did not abuse its discretion when it admitted the documents over Cunningham's hearsay objections. (See Appellant's brief, pp. 7-17.) Nor did the district court apply the incorrect legal standard when it awarded restitution to the state. (See id.)

The documents were properly admitted because hearsay is admissible in a restitution hearing. See I.R.E. 101(d)(7); I.C. §§ 19-5304(6), 37-2732(k). Even if the hearsay rules are applied, the district court properly admitted the documents pursuant to Idaho Rule of Evidence 803(6), the business records exception. Further, the district court applied the correct legal standards when it awarded restitution pursuant to Idaho Code § 37-2732(k) because that award was supported by sworn evidence delineating the tasks performed by each attorney and evidence, based upon payroll records, of the actual prosecution costs to the county.

B. Standard Of Review

When the appellate court reviews the trial court's evidentiary rulings, the appellate court applies an abuse of discretion standard. State v. Jones, 160 Idaho 449, 375 P.3d 279 (2016) (citing Dulaney v. St. Alphonsus Reg'l Med. Ctr., 137 Idaho 160,

163–64, 45 P.3d 816, 819–20 (2002)). To determine whether a trial court abused its discretion, the appellate court considers whether the trial court "correctly perceived the issue as discretionary, whether it acted within the boundaries of its discretion and consistently with applicable legal standards, and whether it reached its decision by an exercise of reason." Id. (quoting Perry v. Magic Valley Reg'l Med. Ctr., 134 Idaho 46, 51, 995 P.2d 816, 821 (2000)).

C. The District Court Did Not Abuse Its Discretion When It Admitted Documents Into Evidence At The Restitution Hearing

At the restitution hearing the state offered two documents, through Ms. Bolland's testimony, which itemized the time spent by each attorney on specific tasks in the case. (7/7/17 Tr., p. 3, L. 17 – p. 12, L. 1; Exs. 1-2.) The district court overruled Cunningham's hearsay objection and admitted the two documents into evidence. (See id.; Exs. 1-2.) The district court properly admitted Exhibits 1 and 2 into evidence during the restitution hearing. As an initial matter, the Idaho Rule of Evidence's prohibitions on admitting hearsay do not apply in a restitution hearing. See I.R.E. 101(d)(7); I.C. § 19-5304(6). Idaho Rule of Evidence 101(d)(7) states that the Idaho Rules of Evidence apply to restitution hearings, "except as modified by I.C. § 19-5304(6)." I.R.E. 101(d)(7). Idaho Code § 19-5304(6), in turn, permits each party to present evidence relevant to restitution and the "court may consider such hearsay as may be contained in the presentence report, victim impact statement or otherwise provided to the court." I.C. § 19-5304(6). Thus, pursuant to the plain language of Idaho Rule of Evidence 101(d)(7)

and Idaho Code § 19-5304(6) the court may consider such hearsay as "otherwise provided to the court" during a restitution hearing.

Cunningham argues, in a footnote, that the provision of Idaho Code § 19-5304(6) that allows the consideration of hearsay in restitution proceedings does not extend to restitution sought under Idaho Code § 37-2732(k). (Appellant's brief, p. 8, n. 3.) Specifically, Cunningham claims that no Idaho Court has applied the § 19-5304(6) exception in a hearing under § 37-2732(k) and claims that, to do so, would contravene the holding of Cunningham and the plain language of I.C. § 37-2732(k). (See id. (citing Cunningham, 161 Idaho at 702, 390 P.3d at 426).) Cunningham also argues the state did not argue the applicability of I.C. § 19-5304(6) below. (See id.) Cunningham's arguments fail.

First, the provision of Idaho Code § 19-5304(6) that allows the consideration of hearsay in restitution proceedings applies to restitution sought under Idaho Code § 37-2732(k). Idaho Rule of Evidence 101(d)(7) sets forth the evidentiary rules that apply in restitution hearings.

> **(d) Rules Inapplicable in Part.** These rules apply in the following proceedings subject to the enumerated exceptions:
>
> > (7) *Restitution hearings.* Restitution hearings except as modified by I.C. § 19-5304(6).

I.R.E. 101(d)(7). Hearings pursuant to Idaho Code § 37-2732(k) are restitution hearings because the plain language of Idaho Code § 37-2732(k) states that upon certain convictions "the court may order *restitution* for costs incurred by law enforcement agencies in investigating the violation." I.C. § 37-2732(k) (emphasis added). Thus

hearings pursuant to Idaho Code § 37-2732(k) are restitution hearings. As a result, Idaho Rule of Evidence 101(d)(7) governs restitution proceedings under Idaho Code § 37-2732(k). Idaho Rule of Evidence 101(d)(7) applies the Idaho Rules of Evidence to restitution hearings, except as modified by Idaho Code § 19-5304(6). And as explained above, Idaho Code § 19-5304(6) permits a court to consider hearsay evidence when deciding restitution. Therefore, the provision of Idaho Code § 19-5304(6) that allows the consideration of hearsay in restitution proceedings applies to restitution sought under Idaho Code § 37-2732(k).

While Idaho's appellate courts have not expressly ruled on the applicability of Idaho Code § 19-5304(6) to restitution proceedings under I.C. § 37-2732(k), the Idaho Supreme Court has recognized the provisions of Idaho Code § 19-5304 can be instructive when awarding restitution under § 37-2732(k). See State v. Kelley, 161 Idaho 686, 692, 390 P.3d 412, 418 (2017). Specifically, the Court held that courts ordering restitution under Idaho Code § 37-2732(k) may consider the factors set forth in Idaho Code § 19-5304(7) to determine whether restitution is appropriate under the circumstances of the case. See id.; see also Cunningham, 161 Idaho 702, 390 P.3d at 428. There is no rational reason to apply Idaho Code § 19-5304(7) to restitution proceedings under § 37-2732(k), but to exclude from consideration the provisions of I.C. § 19-5304(6).

Nor does the holding of Cunningham compel the conclusion that the provisions of Idaho Code § 19-5304(6) are not applicable in restitution proceedings under Idaho Code § 37-2732(k). Cunningham implicitly acknowledges that hearsay should be admitted in § 37-2732(k) restitution hearings. See Cunningham, 161 Idaho at 702, 390 P.3d at 426. In

Cunningham, the Court held that a district court deciding whether to award restitution under § 37-2732(k), may consider the factors set forth in § 19-5304(7). Id. The § 19-5304(7) factors include "the financial resources, needs and earning ability of the defendant." I.C. § 19-5304(7). The district court should also consider "fines imposed, victim restitution, assets, and previous and prospective earning abilities." Cunningham, 161 Idaho at 702, 390 P.3d at 428. It is difficult to imagine that the Cunningham court intended its ruling to require defendants to introduce all this broad financial evidence through non-hearsay methods. There is no rational basis to find that some of provisions of Idaho Code § 19-5304 are applicable to restitution hearings under § 37-2732(k) and others are not.

The Idaho Supreme Court also clarified that the holding in Cunningham is limited. State v. Wisdom, 161 Idaho 916, 923, 393 P.3d 576, 583 (2017). Cunningham only stands for the proposition that to prove expenses actually incurred during prosecution, the state has to introduce "sworn statements that delineate the time spent performing specific tasks." See id.

> We acknowledge our recent cases of *State v. Cunningham*, 161 Idaho 698, 390 P.3d 424, 428 (2017), and *State v. Nelson*, 161 Idaho 692, 390 P.3d 418, 423 (2017), where we held that unsworn representations did not "constitute 'substantial evidence' upon which restitution under [Idaho Code] section 37-2732(k) may be based." Critical to our holdings in *Cunningham* and *Nelson* was the fact that section 37-2732(k) only permits restitution to be awarded for prosecution expenses "*actually incurred*." We were careful to limit our holdings in *Cunningham* and *Nelson* by hewing close to that statutory mandate, instructing that "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." *Cunningham*, 390 P.3d at 428; *Nelson*, 390 P.3d at 423. Thus, *Cunningham* and *Nelson* are limited to restitution under section 37-2732(k), and no analogy can be advanced to this case. Indeed,

> the causation inquiry at issue in this case is plainly not susceptible to a sworn accounting ledger.

Id. Here the state complied with Cunningham. The state introduced sworn testimony regarding the expenses actually incurred in prosecuting the case and delineating the tasks performed. (See 7/7/17 Tr., p. 3, L. 17 – p. 12, L. 1; Exs. 1-2.) Nothing in Cunningham, or cases interpreting it, compels the conclusion that the provisions of Idaho Rule of Evidence 101(d)(7) and Idaho Code § 19-5304(6) do not apply to § 37-2732(k) restitution hearings.

Finally, Cunningham asserts that the state did not argue to the district court that Idaho Code § 19-5304(6) applied when the state was responding to Cunningham's hearsay objections. (Appellant's brief, p. 8, n. 3 (citing *generally* R., Tr.).) Cunningham does not argue that the state should be precluded on appeal from making the argument that § 19-5304(6) applies. (See id.) Nor does Cunningham argue the state somehow waived this argument or that this Court is precluded from addressing this argument on appeal. (See id.) Since Cunningham has not supported any waiver assertion with law or argument, any such implied assertion should not be considered on appeal. See State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) ("When issues on appeal are not supported by propositions of law, authority, or argument, they will not be considered.").

Regardless, the issue of whether Exhibits 1 and 2 should be admitted into evidence was raised below. (See 7/7/17 Tr., p. 6, L. 8 – p. 7, L. 22, p. 9, L. 23 – p. 11, L. 2; Ex. 1, 2.) The only point that was not explicitly discussed below was whether Idaho Code § 19-5304(6) applied to the restitution hearing. (See id.) Even if this Court considers a waiver argument (which Cunningham never actually made), this Court can

still find that the district court reached the correct result when it admitted the documents, albeit by way of alternative legal reasoning. See State v. Garcia-Rodriguez, 162 Idaho 271, 275-276, 396 P.3d 700, 704–705 (2017). The correct law is that the hearsay rules are inapplicable in restitution hearings pursuant to the plain language of Idaho Rule of Evidence 101(d)(7) and Idaho Code § 19-5304(6). Exhibits 1 and 2 were properly admitted during the restitution hearing over Cunningham's hearsay objections.

1. Even If The Hearsay Rules Apply In A Restitution Hearing, The District Court Properly Admitted Exhibits 1 And 2 Pursuant To I.R.E. 803(6) – The Business Records Exception

The hearsay rules do not apply in a restitution hearing. See I.R.E. 101(d)(7); I. C. §§ 19-5304(6), 37-2732(k). However, even if they do apply, the district court did not abuse its discretion when it admitted Exhibits 1 and 2 under the business records exception, I.R.E. 803(6).

Ms. Bolland, an administrative specialist who handles accounts payable and the certificate of records for drug prosecution, testified. (7/7/17 Tr., p. 3, L. 17 – p. 12, L. 1.) She determined, based upon payroll records, what it cost the county to pay the attorneys for the time spent prosecuting the case. (Id.)

> Q. When you are doing the certificates of records for drug prosecution, what's your process?
>
> A. So I will get the file either from the attorney or when a sentencing hearing's set, and open up the file, and, then, there is a purple worksheet where attorneys initial their time and date on their time they spent on the case, so I go through and write down all the attorneys, the dates they worked and the time, and then, I have access to payroll records dating back as far as I need them. I've only needed them from 2014 so far.

> So I'll determine the date the attorney worked. Look back to when they were actually paid for that date and then go through the payroll records and determine an hourly wage based off what they were paid for that month, and, then multiply by the time that they worked, to get what that chunk of time would have cost the county, to pay restitution.

(7/7/17 Tr., p. 4, L. 10 – p. 5, L. 2.) Ms. Bolland testified that the "purple sheet" keeps track of the time that attorneys spent on a particular case. (7/7/17 Tr., p. 5, L. 13 – p. 7, L. 22; Ex. 1.) The "purple sheet" is kept in the ordinary course of business of the Ada County Prosecutor's Office. (Id.)

Cunningham objected to the admission of the "purple sheet" on the grounds that Ms. Bolland did not have personal knowledge that the numbers on the "purple sheet" were accurate. (Id.) The state responded by arguing that the "purple sheet" is the method the office uses to keep records in these matters and that Ms. Bolland uses the numbers on these documents in her ordinary course of business. (Id.) After Ms. Bolland testified to that effect, the district court ruled there was sufficient foundation to admit the documents under the business records exception, I.R.E. 803(6). (Id.)

> THE COURT: Under Rule 803, the exception to hearsay, section 6, Records of Regular Conduct Activity, the availability of the declarant is immaterial if it's regularly kept in the course of business.
>
> I do find there is sufficient foundation based on the testimony. I will allow the admission of Exhibit 1.

(7/7/17 Tr., p. 7, Ls. 14-21.) Ms. Bolland testified how long and what tasks each attorney performed on the case. (7/7/17 Tr., p. 7, L. 25 – p. 9, L. 1.)

Ms. Bolland then testified that she compiled Exhibit 2, the certificate of records affidavit, and that it was accurate, signed and notarized. (7/7/17 Tr., p. 9, L. 2 – p. 11, L. 10; Ex. 2.) Cunningham objected on the same grounds as Exhibit 1, that Ms. Bolland did

not have personal knowledge of the numbers on the document. (Id.) The district court examined Exhibit 2, the testimony of Ms. Bolland and the Supreme Court's holding in Cunningham, and overruled the objection. (7/7/17 Tr., p. 10, L. 5 – p. 11, L. 9.) The district court ruled that Ms. Bollard was qualified as a witness to testify regarding the records. (Id.)

> THE COURT: Can I see Exhibit 2?
>
> This certificate does indicate that Ms. Bolland was first duly sworn deposed and says – and says at the end – "the foregoing to the best of her information and belief." So I do find the certificate to be sworn, which was the requirement of the Supreme Court's decision, so with it being sworn, it's not hearsay. I understand your objection is the underlying information, so, essentially, this is actually a summary.
>
> Can I see Exhibit 2 again. Given that Ms. Bolland is here testifying, this certificate of records is not a self-authenticating certified record of a regularly conducted activity under 901, section 11. While she certifies that the payroll records are kept in the regular course of business, she does not certify that she is the custodian. While she states that she's aware that the Ada County Prosecuting Attorney keeps records, again, she does not state that she's the custodian kept in the regular course of business, so I'm not admitting it as a self-authenticating certified record.
>
> However, Ms. Bolland is here actually testifying, and since she is here testifying under 803(6), the records of regularly conducted activity does not require the testimony to be given by the custodian of the records. The record [sic] actually allows testimony of a custodian or other qualified witness. To the extent she is a qualified witness as to her knowledge and interaction of those records, I will permit the admission of Exhibit 2.

(7/7/17 Tr., p. 10, L. 5 – p. 11, L. 9; Ex. 2.) Ms. Bolland then testified that the total amount of restitution requested for prosecution costs was $906. 75. (7/17/17 Tr., p. 11, L. 19 – p. 12, L. 1.) Cunningham did not cross-examine Ms. Bolland or present evidence. (7/7/17 Tr., p. 12, Ls. 5-16.) After argument by the parties, the district court found the state presented substantial evidence of actual prosecution costs and awarded restitution in

the amount of $906.75, plus $100 for lab costs that was not challenged. (See 7/7/17 Tr., p. 16, L. 4 – p. 18, L. 14.)

On appeal, Cunningham argues that the district court abused its discretion when it admitted the "purple sheet" (Ex. 1) and the affidavit (Ex. 2) under the business records exception to the hearsay rule. (See Appellant's brief, pp. 7-10.) Cunningham does not argue that the state failed to meet the requirements of the business records exception. (See id.) Instead, Cunningham argues that the business records exception could not be utilized by the state. Cunningham argues that "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." (Appellant's brief, p. 8 (citing State v. Sandoval-Tena, 138 Idaho 908, 911-912, 71 P.3d 1055, 1058-1059 (2003).) Sandoval-Tena is inapplicable because neither of the exhibits in this case are "investigative reports," nor were the documents admitted in trial.

The state charged Sandoval-Tena with one count of trafficking in methamphetamine by possessing more than 28 grams. Sandoval-Tena, 138 Idaho at 910, 71 P.3d at 1057. At trial the state called a state lab forensic technician. Id. The district court allowed the admission of the lab report. Id. The forensic technician testified that the substance found was methamphetamine, but failed to testify as to the weight of the methamphetamine. Id. However, the weight of the methamphetamine was contained on the admitted lab report. Id. The district court permitted the state to recall the forensic technician, who testified as to the weight of the methamphetamine. Id. at 910-911, 71 P.3d at 1057-1058. On appeal, Sandoval-Tena argued, in part, the district court erred

when it admitted the lab report as an exhibit, contending the report was inadmissible hearsay. Id. at 1058, 71 P.3d at 1058. The Idaho Supreme Court analyzed two exceptions to the hearsay rule: Idaho Rule of Evidence 803(6), the "business records exception," and Idaho Rule of Evidence 803(8), the "public records exception." Id. Under the "business records exception," reports, records, or data compilations made in the regular course of business, as shown by a qualified witness, may be admitted into evidence. See I.R.E. 803(6). The "public records exception," allows reports, records, or data compilations that sets forth its regularly conducted activities may be admitted into evidence. See I.R.E. 803(8). However, the "public records exception" does not extend to certain investigative reports. See id. Idaho Rule of Evidence 803(8), states in part:

> The following are not within this exception to the hearsay rule: (A) investigative reports by police and other law enforcement personnel, except when offered by an accused in a criminal case; (B) 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; (C) factual findings offered by the government in criminal cases; (D) factual findings resulting from special investigation of a particular complaint, case, or incident, except when offered by an accused in a criminal case.

I.R.E. 803(8). The Idaho Supreme Court relied on United States v. Oates, 560 F.2d 45, 68 (2nd Cir. 1977), in which a similar lab report was held inadmissible under a similar public records exception. Sandoval-Tena, 138 Idaho at 912, 71 P.3d at 1059. In Oates, the court held that the lab reports were made for the specific purposes of convicting the defendant. See Oates, 560 F.2d at 68. The holding in Sandoval-Tena, which relied upon Oates extended the "investigative report" limitation in I.R.E. 803(8) to I.R.E. 803(6) in the context of a jury trial with the goal of convicting the defendant. Here, there is no plausible interpretation that an itemized list of attorney tasks and costs is an

"investigative report." Nor do the same protections at trial apply at a restitution hearing. The holding in Sandoval-Tena does not eliminate the applicability of the business records exception for the state in a restitution hearing.

Because the business records exception was available to the state in the restitution hearing, Cunningham has failed to show the district court abused its discretion when it overruled his hearsay objection and admitted Exhibits 1 and 2 pursuant to the business records exception.

D. The District Court Applied The Correct Legal Standard When It Awarded Restitution Pursuant To Idaho Code § 37-2732(k)

The district court did not abuse its discretion when it awarded restitution. Contrary to Cunningham's argument on appeal, the district court applied the correct legal standard when it awarded restitution. The district court ruled that the state presented substantial and competent evidence to support the restitution award.

> THE COURT: The restitution award under section 37-2732(k) must be based on a preponderance of the evidence, and the award of restitution will not be disturbed if it's supported by substantial evidence. Whether an award of restitution under that statute is within the discretion of the court in the previous statement, the Supreme Court found fault in that, and it did not itemize time entry, explaining the task performed or expenditures made in a particular case. Although, it was signed, the signature did not comport to certify that it is correct.
>
> In this particular case, we have evidence by way of testimony, as well as by the written certificate of record, that the calculation is true and correct to the best of the information and belief. It is sworn. I do not find that the Supreme Court's decision requires that it actually be sworn by an attorney. Clearly, any custodian of records or competent witness can testify. I do find that the person who reviews the records that were kept in the regular course of business, and these records indicate the amount of time and the type of effort that was expended by each attorney. The testimony was that each one was an attorney. That they were then billed

> on the actual payroll records of Ada County at the time that the expenses were actually incurred, so I do find that the evidence and testimony is sufficient to show that $906.75 of prosecution costs were actually incurred in this case.
>
> As to the policy argument about whether drug costs for prosecution should be assessed, that's an argument for the legislature. I do not find it to be unconstitutional. Court costs are routinely ordered in every case. It's just this particular type of case, the legislature has allowed a different compensation scheme for law-enforcement agencies to recover costs, so I don't find that it's a valid due process argument, and so if there's an argument that it should not be assessed, that's really an argument for the legislature.
>
> I understand it is within the discretion of the court. I do find that the cost now verified are now reasonable, and I do find that since Mr. Cunningham is on parole, he is eligible and able to pay those. Quite frankly, even when he was incarcerated with an original order, with the original order even at that time, restitution is not based on one's immediate ability to pay restitution but eventual ability to pay restitution.
>
> As to the delay in time, the delay in time is actually caused by the appeal and the remand, and that delay of time in receiving the Supreme Court's decision does not make a restitution order any less reasonable at this time since this is the time of the hearing, for the remand. So to that extent, I do find there's substantial and competent evidence to show that there are $906.75 in prosecution costs.
>
> As to the $100 in lab costs that was previously ordered, that was not the subject of the Supreme Court's decision vacating and remanding, so that portion was not appealed, so that will be $100 for the lab costs that were supported by the lab reports in the presentence investigation, so that makes a total order restitution $1,006.75.

(7/7/17 Tr., p. 16, L. 4 – p. 18, L. 14.)

Cunningham argues the district court applied the incorrect legal standard, contending the documents and testimony presented by the state at the restitution hearing did not comply with the ruling in Cunningham because, he claims, the evidence was "unsworn." (Appellant's brief, pp. 10-13.) Cunningham argues that the evidence was

"unsworn" because the individual attorneys who performed the tasks itemized on Exhibit 1 (the "purple sheet") did not submit their time sheets as sworn affidavits. (See id.) "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." (Appellant's brief, p. 13 (citation omitted).) Cunningham's argument is based upon a misunderstanding of how hearsay and evidence operates.

There is no requirement, or even expectation, that documents admitted under the business records exception have to be sworn at every level. Idaho Rule of Evidence 801(c) defines hearsay as:

> **(c) Hearsay.** "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

I.R.E. 801. Generally hearsay is not admissible, except as provided by the Idaho Rules of Evidence or other rule. See I.R.E. 802. One of the ways hearsay can be admissible is through the business records exception, which allows reports or data, if kept in the course of regularly conducted business activity, to be admissible if "shown by the testimony of the custodian or other qualified witness." See I.R.E. 803(6).

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness.
>
> **(6) Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other

> qualified witness, or by certification that complies with Rule 902(11), unless the opponent shows the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

I.R.E. 803(6).

Thus, the business records exception explicitly contemplates documents kept in the ordinary course of business will be admissible if testified to by a qualified witness. Documents kept in the ordinary course of business are not sworn. The regular course of business does not include stamping all documents and data with notary seals. The rule provides that so long as the qualified witness testifies that the documents at issue were kept in the regular course of business the underlying unsworn documents are admissible.

Here, Ms. Bolland was a qualified witness and she gave sworn testimony that Exhibit 1 was kept within the ordinary course of business, thus satisfying the foundational requirements of I.R.E. 803(6). (See 7/7/17 Tr., p. 4, L. 2 – p. 7, L. 22; Ex. 1.) Cunningham's argument that the underlying documents need to be sworn, in addition to Ms. Bolland's sworn testimony, is without merit.

The district court's ruling complies with Cunningham. Cunningham held that a one-paragraph form was inadequate because it was a "boilerplate, fill-in-the-blank-style form" which only stated the total number of hours and rate and did not contain itemized time entries explaining the tasks performed. Cunningham, 161 Idaho at 700, 390 P.3d at 426. Nor was the form sworn as correct. Id. The Court noted, for future guidance, that "[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.

That is what happened here. Ms. Bolland swore that Exhibit 1, which delineated the time spent by attorneys in this case, was kept in the ordinary course of business and was used by her to complete a sworn certificate. (7/7/17 Tr., p. 5, L. 13 – p. 9, L. 1.; Ex. 1.) The Cunningham decision does not change the rules of evidence or requirements regarding the admission of evidence. Cunningham clarified that the "burden to prove expenses actually incurred will generally require sworn statements that delineate the time spent performing specific tasks." Wisdom, 161 Idaho at 923, 393 P.3d at 583. Here, Exhibit 1, which was admitted into evidence via sworn testimony, delineated the time spent by attorneys performing specific tasks. (See Ex. 1.) Further, Ms. Bolland testified regarding these specific tasks. (7/7/17 Tr. p. 7, L. 25 – p. 8, L. 23.) Cunningham held that the documents admitted in a restitution hearing had to be sworn into evidence – just like any other restitution hearing. There is no additional evidentiary requirement imposed by Cunningham.

The state also complied with the holding in Cunningham by having Ms. Bolland testify, under oath, and submit an affidavit detailing the amount of time spent and how much the prosecution cost the county. (See 7/7/17 Tr., p. 7, L. 25 – p. 12, L. 1; Exs. 1-2.) Ms. Bolland swore that the attorney information was "true and correct to the best of [her] information and belief." (See Ex. 2.)

> 3. I have reviewed the time log in this case, which documents the prosecutor time spent prosecuting the above reference drug case. Erin Pittenger spent a total of .2 hours working on this case, Heather Reilly spent .1 hours working on this case, Kale Gans spent .7 hours working on

> this case, James Vogt spent 3.5 hours working on this case, and Barbara Duggan spent 11.5 hours working on this case. I've applied the appropriate payroll rate for said attorneys and calculated the aggregate actual prosecution cost to be a total of $906.75.
>
> ...
>
> 5. The foregoing is true and correct to the best of my information and belief.

(Ex. 2.) The district court's restitution award was based upon substantial and competent evidence.

Further, as a practical and public policy matter, it makes far more sense to have the person in charge of payroll provide testimony regarding the restitution costs than requiring attorneys to provide testimony regarding what actual costs were incurred by the county. Regardless of any public policy considerations, the state complied with the holding in Cunningham and provided evidence, both in the form of live sworn testimony and a sworn affidavit, regarding the actual cost incurred by the state in prosecuting this case. The district court applied the correct legal standard when it awarded restitution.

E. The State Introduced Sworn Testimony Regarding The Actual Costs Incurred By The County

The state provided sworn testimony that the restitution award was based upon the payroll records of Ada County. (7/7/17 Tr., p. 4, L. 10 – p. 5, L. 2; Ex. 2.) On appeal, Cunningham argues that there was insufficient evidence to support the district court's restitution finding because the state did not introduce payroll documentation for the prosecutors' individual pay rates. (See Appellant's brief, pp. 13-16.) Cunningham claims that Ms. Bolland's sworn testimony is insufficient to support the district court's

finding. (See id.) Cunningham argues that Ms. Bolland's testimony fails to show "how that data is actually related to the losses claimed." (See Appellant's brief, p. 14 (citing State v. Hurles, 158 Idaho 569, 577, 349 P.3d 423, 431 (2015).) Cunningham's argument on appeal fails.

Ms. Bolland testified that she looked back to what each attorney was actually paid to determine the attorney's hourly wage and then she multiplied that hourly wage by the time spent working on the case. (7/7/17 Tr., p. 4, L. 10 – p. 5, L. 2; Ex. 2.) Based upon this she was able to determine how much it cost the county to prosecute the case. (See id.) She testified that she calculated, based upon payroll records, that the total amount of prosecution costs was $906.75 for the time spent prosecuting this case. (7/7/17 Tr., p. 4, L. 10 – p. 12, L. 1; Ex. 2.) This evidence was admitted by the district court. (See id.)

Here, unlike in Hurles, the losses incurred were directly identified and testified to by Ms. Bolland. Ms. Bolland testified that she went through the payroll records for each individual attorney and determined their rates of pay for the dates they worked. (7/7/17 Tr., p. 4, L. 10 – p. 5, L. 12.) She swore the "actual prosecution cost to be a total of $906.75." (7/7/17 Tr., p. 11, L. 19 – p. 12, L. 1; Ex. 2.)

On appeal Cunningham appears to argue that additional foundation was required to admit this testimony, such as more payroll information. (See Appellant's brief, pp. 13-16.) This is incorrect. As explained above, Ms. Bolland was familiar with the payroll records that were kept in the ordinary course of business and testified as to the amount of prosecution costs. If Cunningham wanted additional information from Ms. Bolland it was incumbent upon him to cross-examine Ms. Bolland and question that underlying

documentation or her calculation. However, Cunningham declined to do so. (See 7/7/17 Tr., p. 12, Ls. 5-16.) The state presented the sworn testimony of someone who knew the payroll records and testified as to how much the county paid for prosecution costs. This is what is required by the holding in Cunningham, the plain language of Idaho Code § 37-2732(k) and the Idaho Rules of Evidence. Cunningham's attempt to impose additional requirements on the sworn testimony should be rejected. The district court had substantial and competent evidence to support its restitution determination.

CONCLUSION

The state respectfully requests this Court affirm the second amended judgment and amended restitution order of the district court.

DATED this 12th day of April 2018.

/s/ Ted S. Tollefson_______________
TED S. TOLLEFSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 12th day of April 2018, served a true and correct copy of the attached BRIEF OF RESPONDENT by emailing an electronic copy to:

BRIAN R. DICKSON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Ted S. Tollefson_______________
TED S. TOLLEFSON
Deputy Attorney General