2-21-2018

State v. Pagan-Lopez Appellant's Brief Dckt. 45269

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 45269**
Plaintiff-Respondent,	)	
	)	**ADA COUNTY NO. CR01-16-41054**
v.	)	
	)	
CARLOS ENRIQUE PAGAN-LOPEZ,	)	**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

Carlos Pagan-Lopez appeals from his judgment of conviction for two drug-related offenses. These charges arose from a traffic stop and Mr. Pagan-Lopez's subsequent arrest. At the jail, law enforcement found methamphetamine in his sock. Based on this methamphetamine, the State charged him with possession of a controlled substance and introduction of major contraband into the jail. Mr. Pagan-Lopez moved to suppress the evidence because the officers lacked reasonable suspicion for the traffic stop and their discovery of an arrest warrant did not purge the taint of the initial illegality. The district court denied the motion. Mr. Pagan-Lopez then tried to enter a guilty plea, pursuant to a plea agreement with the State, but the district court refused it. The district court reasoned that Mr. Pagan-Lopez had a viable affirmative defense—one which he knowingly and voluntarily desired to waive—and thus rejected his plea. At trial, the district court excluded Mr. Pagan-Lopez's proffered testimony about his mental health condition. The jury found him guilty of both offenses. Later, the district court awarded the State over $900 in restitution for its alleged cost to prosecute Mr. Pagan-Lopez.

On appeal, Mr. Pagan-Lopez raises five issues. First, he argues the district court erred by denying his motion to suppress. Second, he asserts the district court abused its discretion by rejecting his guilty plea. Third, he contends his double jeopardy rights under the Idaho Constitution were violated because possession of a controlled substance was a lesser included offense of introduction of major contraband. Fourth, he submits the district court abused its discretion by excluding his layperson testimony about his mental health condition. Fifth, he asserts the district court abused its discretion by order him to pay restitution to the State for its

prosecution costs. Based on these errors, this Court should vacate his judgment of conviction and the district court's restitution order and remand this case.

Statement of Facts and Course of Proceedings

On December 2, 2016, Officer Feldner and another police officer conducted a traffic stop of Mr. Pagan-Lopez and his fiancé. (Tr. Vol. I, p.12, Ls.16–21, p.13, Ls.2–12.) The officers learned Mr. Pagan-Lopez had an active felony arrest warrant. (Tr. Vol. I, p.13, Ls.12–15.) Mr. Pagan-Lopez was arrested and taken to the Ada County Jail. (Tr. Vol. I, p.13, Ls.16–17.) During his booking search at the jail, law enforcement found a small baggie with methamphetamine tucked in his sock. (Tr. Vol. I, p.13, L.19–p.14, L.1.)

Based on this methamphetamine, the State alleged Mr. Pagan-Lopez committed two offenses: possession of a controlled substance (methamphetamine), in violation of I.C. § 37-2732(c), and introduction of major contraband (methamphetamine) into a correctional facility, in violation of I.C. § 18-2510(3). (R., pp.8–9.) The magistrate held a preliminary hearing and bound Mr. Pagan-Lopez over to district court. (R., pp.22–25; *see generally* Prelim. Hr'g Tr.[1]) The State charged Mr. Pagan-Lopez with both offenses. (R., pp.31–32.) Mr. Pagan-Lopez entered a plea of not guilty. (R., p.35.)

Mr. Pagan-Lopez moved to suppress all evidence following the traffic stop and subsequent search at the jail. (R., pp.49, 50–53.) He argued the officers did not have reasonable suspicion to stop him and the officer's discovery of an arrest warrant was not sufficiently attenuated from the unlawful stop. (R., pp.50–53.) The State did not file a response. The district

[1] This transcript, admitted at the suppression motion hearing, will be cited separately as "Prelim. Hr'g Tr."

court held a hearing on the motion. (*See generally* Tr. Vol. I,[2] p.1, L.7–p.19, L.4.) At the hearing, the parties stipulated to the admission of the preliminary hearing transcript and two exhibits: a Google Earth overview of the residential area in question and an incident report. (Tr. Vol. I, p.1, L.23–p.2, L.3, p.2, L.14–p.3, L.15; *see also* Prelim. Hr'g Tr.; State's Exs.1–2.[3]) The parties also stipulated to the fact that law enforcement was responding to a silent residential alarm at 2294 South Longmont Drive. (Tr. Vol. I, p.2, L.22–p.3, L.3, p.3, L.12–p.4, L.4.)

After further argument by the parties, the district court orally denied the motion. (Tr. Vol. I, p.12, L.12–p.18, L.23.) The district court found the following facts:

> On December 2 of 2016, at, approximately, 5:02 o'clock a.m. Officers Feldner and Sontag were dispatched to a silent residential alarm on a laundry room door at 2294 South Longmont Drive, which sits at the very end of a dead-end street as depicted in Exhibit 1.
>
> Officers observed that the house was on a short dead-end street and saw a white van at the stop sign preparing to exit the street. It was the only operating vehicle on the street. Officers observed that there wasn't much traffic at all, and hadn't seen very many other vehicles. The officers decided to perform a stop on the vehicle for suspicion of burglary. That stop occurred—it appears—between 5:11 o'clock and 5:14 o'clock a.m.
>
> After stopping the car, officers observed there was a driver and a passenger in the vehicle. Officers began the identification of the driver at 5:14 o'clock by driver's license. Officers began the identification of the passenger at 5:15 o'clock a.m. by the driver's license. Officers identified the passenger as defendant Carlos Pagan-Lopez. Officers ran the occupants of the vehicle for wants and warrants and discovered at 5:21 o'clock that the defendant had an active felony warrant for his arrest.
>
> It was at that time that Officer Feldner placed defendant under arrest and Officer Ellis transported him to the jail. At the jail, Officer Keber participated in booking the defendant. When Officer Keber searched the defendant, he

[2] There are two transcripts on appeal. The first, cited as Volume I, contains the motion to suppress hearing, entry of plea hearing, and trial. The second, cited as Volume II, contains the sentencing hearing.

[3] The suppression motion exhibits and trial exhibits both have exhibits labeled State's Exhibits 1 and 2. For ease of reference, the trial exhibits will be cited as "State's Tr. Ex." with the corresponding number.

> discovered a small Ziploc Baggie that appeared to contain methamphetamine. At the intake room of the Ada County Jail, the baggie was on the defendant's left leg slightly above where his sock line was. The defendant removed it from that location and handed it to Officer Keber. That small Ziploc Baggie contained methamphetamine.

(Tr. Vol. I, p.12, L.16–p.14, L.1.) After finding these facts, the district court ruled that the officers had reasonable suspicion to conduct the traffic stop for their silent alarm investigation. (Tr. Vol. I, p.16, L.13–p.18, L.6.) The district court also determined the detention was not any longer than necessary because, shortly after the stop, the officers learned of the active felony arrest warrant. (Tr. Vol. I, p.18, Ls.7–14.) Therefore, the district court held that the evidence gained as a result of the stop (the methamphetamine) was admissible and denied the motion. (Tr. Vol. I, p.18, Ls.7–9, 15–23.)

Three days later, Mr. Pagan-Lopez informed the district court that he desired to enter a guilty plea pursuant to a plea agreement with the State. (Tr. Vol. I, p.24, L.6–p.25, L.2.) In exchange for Mr. Pagan-Lopez's guilty plea to possession of a controlled substance, the State agreed to dismiss the other charge of introduction of major contraband. (Tr. Vol. I, p.27, Ls.6–11.) The State agreed to recommend probation, with an underlying sentence of five years, with two years fixed. (Tr. Vol. I, p.27, Ls.11–16.) Mr. Pagan-Lopez's guilty plea would not be conditional, meaning that he would not reserve the right to appeal the district court's denial of his suppression motion. (Tr. Vol. I, p.26, L.24–p.27, L.4.) During the plea colloquy, Mr. Pagan-Lopez admitted to possession of a controlled substance, but also explained that he initially picked up the substance intending to throw it away. (Tr. Vol. I, p.34, Ls.4–24.) He said there were children around the area where he found it. (Tr. Vol. I, p.35, Ls.4–9.) He further explained that he put the substance in his sock and forgot about it. (Tr. Vol. I, p.34, L.25–p.35, L.9.) Due to these statements, the district court refused to accept Mr. Pagan-Lopez's guilty plea because the

district court believed he had a potential affirmative defense of necessity, which somehow invalidated his admission to committing the crime. (*See* Tr. Vol. I, p.35, L.10–p.37, L.22.) Consequently, Mr. Pagan-Lopez proceeded to trial.

At trial, the State called four witnesses. First, Officer Feldner testified that he arrested Mr. Pagan-Lopez per dispatch's instruction after a traffic stop. (Tr. Vol. I, p.142, L.6–p.145, L.15.) This occurred early in the morning on December 2, 2016. (Tr. Vol. I, p.139, L.24–p.140, L.14.) During a search incident to arrest, Officer Feldner testified that he found a hypodermic needle in Mr. Pagan-Lopez's pocket. (Tr. Vol. I, p.151, Ls.4–11.) Officer Feldner did not preserve the needle as evidence or cite Mr. Pagan-Lopez for possession of the needle. (Tr. Vol. I, p.151, L.25–p.152, L.25.) Officer Feldner explained that a different officer, Officer Ellis, transported Mr. Pagan-Lopez to the Ada County Jail. (Tr. Vol. I, p.146, Ls.21–25.) Next, Deputy Keber with the Ada County Jail testified that he searched Mr. Pagan-Lopez at the jail and found a small baggie with a crystal-like substance inside Mr. Pagan-Lopez's sock "almost like it was maybe stuck to his leg." (Tr. Vol. I, p.160, L.22–p.162, L.12.) Then, Deputy Ellis testified that he transported Mr. Pagan-Lopez to the jail and was present during Deputy Keber's search and discovery of the baggie. (Tr. Vol. I, p.174, Ls.15–18, p.175, L.5–p.177, L.24; *see also* State's Tr. Ex. 1 (baggie photograph).) Finally, Corinna Owsley with the Idaho State Police Forensic Services testified that the crystal substance in the baggie tested positive for methamphetamine. (Tr. Vol. I, p.190, L.19–p.191, L.15.) The State rested. (Tr. Vol. I, p.194, L.16.)

After the State rested, Mr. Pagan-Lopez informed the district court that he desired to testify in his defense. (Tr. Vol. I, p.195, L.6–p.198, L.15.) His trial counsel told the district court and the State that he intended to ask Mr. Pagan-Lopez about his memory problems and epilepsy. (Tr. Vol. I, p.198, Ls.20–23.) Mr. Pagan-Lopez suffered from short-term memory loss. (Tr. Vol.

I, p.201, Ls.8–10.) Trial counsel explained that this evidence was relevant as to why Mr. Pagan-Lopez failed to inform law enforcement about the baggie of methamphetamine in his sock. (Tr. Vol. I, p.199, Ls.6–14.) Trial counsel clarified that he did *not* intend to have Mr. Pagan-Lopez testify that he was not "capable of knowingly possession anything given his mental condition." (Tr. Vol. I, p.201, Ls.5–8.) The State objected. (Tr. Vol. I, p.198, L.24–p.199, L.4, p.199, Ls.16–22.) The district court ruled that evidence was inadmissible because Mr. Pagan-Lopez failed to give the State notice. (Tr. Vol. I, p.199, L.23–p.201, L.4, p.201, Ls.14–20.)

Mr. Pagan-Lopez testified that, on December 1, 2016, he had gone to the Corpus Christi House with his fiancé to take a shower, get clothing, and check his mail. (Tr. Vol. I, p.205, L.6–p.207, L.9.) There are separate showers for men and women, but the showers are open and available to children. (Tr. Vol. I, p.207, Ls.10–16, p.208, Ls.20–23.) After he took a shower, Mr. Pagan-Lopez said he saw the baggie under a bench as he was getting dressed. (Tr. Vol. I, p.208, Ls.2–10.) He grabbed the baggie to give it to the Corpus Christi House director, but he forgot after his fiancé told him he had to go to a meeting. (Tr. Vol. I, p.208, Ls.10–17.) He testified that he put the baggie in his sock. (Tr. Vol. I, p.209, Ls.3–4.) Mr. Pagan-Lopez and his fiancé then left the Corpus Christi House, visited friends, did laundry, and went to a church dinner. (Tr. Vol. I, p.211, Ls.5–12.) He testified that he had forgotten about the baggie once he left the Corpus Christi House. (Tr. Vol. I, p.209, Ls.13–15.) By the early morning of December 2, Mr. Pagan-Lopez and his fiancé were driving around collecting aluminum cans to sell for gas money. (Tr. Vol. I, p.209, Ls.16–23.) He testified that he found a used syringe (which he also intended to dispose of) while looking for cans. (Tr. Vol. I, p.210, Ls.5–19.) After that, Mr. Pagan-Lopez and his fiancé continued to collect cans until the traffic stop by Office Feldner.

(Tr. Vol. I, p.211, Ls.1–6.) He explained that Officer Feldner searched him, found the syringe, and had him transported to the jail. (Tr. Vol. I, p.211, L.14–p.212, L.1.) At the jail, Mr. Pagan-Lopez testified that he was searched and the baggie in his sock was found. (Tr. Vol. I, p.212, Ls.6–18.) Mr. Pagan-Lopez testified that he did not remember the baggie until then. (Tr. Vol. I, p.211, Ls.7–10, p.212, Ls.2–3, 12–14.) After Mr. Pagan-Lopez's testimony, the defense rested. (Tr. Vol. I, p.218, Ls.1–5.)

On rebuttal, the State recalled Officer Feldner. (Tr. Vol. I, p.231, Ls.1–16.) Officer Feldner testified that the syringe had a cap and looked new. (Tr. Vol. I, p.233, Ls.2–20; *see also* State's Exs.3–4.) On cross-examination, Officer Feldner admitted that he characterized the syringe as used in his report, but then explained on redirect that that could be attributable to the absence of packaging and "just coming off of someone's person." (Tr. Vol. I, p.240, Ls.8–10, p.241, Ls.9–10.)

Both parties rested. (Tr. Vol. I, p.241, L.23–p.242, L.4.) In closing, the State argued Mr. Pagan-Lopez was guilty of both possession of a controlled substance and introduction of major contraband due to the baggie of methamphetamine found in his sock during the jail search. (*See generally* Tr. Vol. I, p.254, L.6–p.262, L.1.)

The jury found Mr. Pagan-Lopez guilty of both charges. (Tr. Vol. I, p.277, Ls.6–25; R., p.105.)

At the start of the sentencing hearing, the district court noted the State's request for $1,152.25 in restitution, including $996.27 in drug prosecution costs. (Tr. Vol. I, p.4, Ls.4–17.) The State's request consisted of a sworn "Certificate of Records" from an employee of the Ada County Prosecuting Attorney's Office, who had access to payroll records. (R., pp.116–17.) The Certificate of Records identified the time spent by various attorneys on the case, but did not

identify the specific tasks, dates, or hourly rates. (R., pp.116–17.) Mr. Pagan-Lopez objected to the State's request for its prosecution costs. (Tr. Vol. II, p.4, L.22–p.5, L.11.) He argued, among other things, the breakdown of attorney's time spent on the case was not sufficient to award restitution. (Tr. Vol. II, p.5, Ls.7–11.) The parties then made their sentencing recommendations. (Tr. Vol. II, p.6, L.19–p.13, L.5.) The district court sentenced Mr. Pagan-Lopez to five years, with one year fixed, for possession of a controlled substance, and two and one-half years, with zero fixed years, for introduction of major contraband, to be served concurrently. (Tr. Vol. II, p.14, Ls.3–10; R., pp.109–12.) The district court also retained jurisdiction. (Tr. Vol. II, p.15, Ls.1–17; R., p.110.) As for restitution, the district court ordered the full amount requested by the State. (Tr. Vol. II, p.14, Ls.21–22; R., pp.114–15.) The district court did not provide any reasoning on the record regarding its restitution award. (*See* Tr. Vol. II, p.14, Ls.21–22.)

Mr. Pagan-Lopez timely appealed from the district court's judgment of conviction. (R., pp.109–12, 118–19.)

ISSUES

I. Did the district court err by denying Mr. Pagan-Lopez's motion to suppress?

II. Did the district court abuse its discretion by rejecting Mr. Pagan-Lopez's guilty plea?

III. Did Mr. Pagan-Lopez's convictions and punishments for possession of a controlled substance and introduction of contraband into the jail violate his right to be free from double jeopardy?

IV. Did the district court abuse its discretion at trial by excluding Mr. Pagan-Lopez's layperson testimony of his mental health?

V. Did the district court abuse its discretion by ordering Mr. Pagan-Lopez to pay restitution for the State's prosecution costs?

ARGUMENT

I.

The District Court Erred By Denying Mr. Pagan-Lopez's Motion To Suppress

A. Introduction

Mr. Pagan-Lopez asserts the district court should have granted his motion to suppress because the warrantless traffic stop violated his Fourth Amendment rights. This traffic stop was unlawful because the police officers did not have reasonable suspicion for the seizure. Moreover, the officers' discovery of an arrest warrant for Mr. Pagan-Lopez did not break the causal chain between the unlawful stop and the discovery of evidence on his person at the jail. Since the discovery of the arrest warrant was not a sufficient intervening circumstance, the exclusionary rule required suppression of the evidence obtained after the unlawful seizure.

B. Standard Of Review

The Court uses a bifurcated standard to review a district court's order on a motion to suppress. *State v. Danney*, 153 Idaho 405, 408 (2012); *see also State v. Hunter*, 156 Idaho 568, 571 (Ct. App. 2014) (same). The Court will accept the trial court's findings of fact "unless they are clearly erroneous." *State v. Wulff*, 157 Idaho 416, 418 (2014). "At a suppression hearing, the power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court." *State v. Ellis*, 155 Idaho 584, 587 (Ct. App. 2013). The Court exercises free review of "the trial court's application of constitutional principles to the facts found." *Danney*, 153 Idaho at 408. Determinations of reasonable suspicion are reviewed de novo. *State v. Morgan*, 154 Idaho 109, 111 (2013) (citing *State v. Munoz*, 149 Idaho 121, 127 (2010)).

C. The District Court Should Have Granted Mr. Pagan-Lopez's Motion Because The Police Officers Did Not Have Reasonable Suspicion For The Traffic Stop And The Discovery Of Evidence Was Not Adequately Attenuated From The Unlawful Stop

"The Fourth Amendment of the United States Constitution protects citizens from unreasonable search and seizure." *State v. Hansen*, 138 Idaho 791, 796 (2003). "Article I, Section 17 of the Idaho Constitution nearly identically guarantees that '[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated.'" *State v. Green*, 158 Idaho 884, 886 (2015) (alteration in original). A warrantless seizure is presumptively unreasonable, unless the State shows that the seizure fits within a well-established exception to the warrant requirement. *Green*, 158 Idaho at 886–87; *see also Halen v. State*, 136 Idaho 829, 833 (2002) ("When a warrantless search or seizure is challenged by the defendant, the State bears the burden to show that a recognized exception to the warrant requirement is applicable."); *State v. Hunter*, 156 Idaho 568, 570 (Ct. App. 2014) (same). In this case, Mr. Pagan-Lopez first asserts the State failed to meet its burden to justify his warrantless seizure. Second, he argues the discovery of the arrest warrant was not an intervening circumstance that sufficiently purged the taint of his unlawful seizure.

1. There Was No Reasonable Suspicion To Justify The Traffic Stop

"Traffic stops constitute seizures under the Fourth Amendment." *Morgan*, 154 Idaho at 112 (quoting *State v. Henage*, 143 Idaho 655, 658 (2007)). "Limited investigatory detentions are permissible when justified by an officer's reasonable articulable suspicion that a person has committed, or is about to commit, a crime." *Id.* "[T]ypically, seizures must be based on probable cause to be reasonable. However, limited investigatory detentions, based on less than probable cause, are permissible when justified by an officer's reasonable articulable suspicion that a person has committed, or is about to commit, a crime." *State v. Bly*, 159 Idaho 708, 710

(Ct. App. 2016) (internal citations omitted) (citing *Florida v. Royer*, 460 U.S. 491, 498, 499–500 (1983) (plurality opinion)).

"Reasonable suspicion must be based on specific, articulable facts and the rational inferences that can be drawn from those facts." *Morgan*, 154 Idaho at 112 (quoting *State v. Bishop*, 146 Idaho 804, 811 (2009)). "[A]n officer may take into account his experience and law enforcement training in drawing inferences from facts gathered," *Danney*, 153 Idaho at 410, but "[t]he officer, of course, must be able to articulate something more than an 'inchoate and unparticularized suspicion or 'hunch.'" *United States v. Sokolow*, 490 U.S. 1, 7 (1989); *see also Morgan*, 154 Idaho at 112 (same). "The test for reasonable suspicion is based on the totality of the circumstances known to the officer at or before the time of the stop." *Morgan*, 154 Idaho at 112.

In this case, the facts known to the officers did not give rise to reasonable suspicion for Mr. Pagan-Lopez's seizure. "The Supreme Court has previously held that otherwise innocent acts, when considered together, can be sufficiently suspicious so as to justify an investigative detention." *State v. Kelley*, 160 Idaho 761, 764 (Ct. App. 2016) (citing *Sokolow*, 490 U.S. at 9–10). Here, however, the innocent facts are not sufficiently suspicious. The officers knew that a silent residential alarm went off in the laundry room door of a house at approximately 5:00 a.m. (*See* State's Ex. 2, p.2.) The officers were responding to that alarm, but had no knowledge of its cause, be it a household member, an animal, a fallen item, an alarm malfunction, or an unwanted intruder. While driving east on Iowa Street towards Longmont Street (the residence's street), the officers saw a vehicle at the stop sign on Longmont Street. (*See* Prelim. Hr'g Tr., p.16, Ls.9–21; State's Ex. 1.) They immediately stopped the vehicle, without even going down Longmont Street or checking on the residence. (Prelim. Hr'g Tr., p.16, Ls.22–24.) Officer Feldner testified that he

believed the vehicle was involved in a potential, but wholly unverified, burglary of the residence because it "was present on that dead end street at the time of day, being the only vehicle there." (Prelim. Hr'g Tr., p.17, Ls.13–16; *see also* Prelim. Hr'g Tr., p.17, Ls.3–12.) He acknowledged that there were no other facts connecting the vehicle to his investigation. (Prelim. Hr'g Tr., p.17, Ls.17–19.) Officer Feldner's testimony, coupled with the facts known to the officers at the time of the stop, show that the officers were acting on nothing more than a hunch that this vehicle was involved in the silent residential alarm. Thus, the totality of the circumstances did not establish reasonable suspicion to conduct the traffic stop.

Further, the facts here are distinguishable from other alarm response or burglary report cases. In the other cases, the officers possessed some additional fact regarding the alarm or report, the premises, or the suspect to create reasonable suspicion. For example, in *State v. Robertson*, an officer responded to an "audible security alarm" for a local business, which had been burglarized and vandalized in the recent past. 134 Idaho 180, 183, 185 (Ct. App. 2000). It was night. *Id.* at 183. The officer saw a single individual walking away from the business about 100 to 125 feet away. *Id.* The Court of Appeals held that the officer had reasonable suspicion to detain the individual. *Id.* at 185. Similarly, in *State v. Rawlings*, multiple officers responded to a report of a burglary for a business on Fairview Avenue in Boise, Idaho, between 4:30 and 5:00 a.m. 121 Idaho 930, 931, 932 (Ct. App. 1991). The building had visible signs of forced entry, and the police "believed that the perpetrator could still be on the premises." *Id.* at 932–33. One officer at the scene saw an individual about 150 feet away in the business's parking lot. *Id.* at 931. The individual was walking away from the business, out of the officer's view, and towards a motel. *Id.* at 933. The Court of Appeals held that the facts, taken together, provided reasonable suspicion to detain the individual. *Id.* at 933. Likewise, in *State v. Kessler*, multiple officers

responded to a report of two or three people breaking a vehicle's window in an apartment complex around 1:30 am. 151 Idaho 653, 654 (Ct. App. 2011). One officer saw three men in dark clothing running away from the crime scene, and the men did not stop upon the officer's command. *Id.* The officer was able to apprehend one of them. *Id.* Another officer went to an area six to eight blocks away in the direction the men were running and saw a man in dark clothing walking briskly towards the officer. *Id.* at 654, 657. When the man saw the officer, the man stopped and looked away, "causing the officer to believe that he might be planning to run." *Id.* at 654. The Court of Appeals held that it was objectively reasonable to detain the individual to investigate the reported crime. *Id.* at 657.

In contrast to *Robertson*, *Rawlings*, and *Kessler*, the officers in this case lacked any objectively reasonable facts to elevate their inchoate hunch to reasonable suspicion of criminal activity. The alarm here was a silent alarm for a residence, not an audible security alarm for a closed business or a report of a burglary. A business security alarm or burglary report weighs in favor of criminal activity, but there are many innocent reasons why a residential alarm would go off in the early morning. And, unlike the other cases, the officers here had not even arrived at the scene or determined the cause of the alarm before detaining Mr. Pagan-Lopez. In addition, there was no evidence that the residence had been burglarized or vandalized in the past. Also, unlike *Rawlings* and *Kessler*, Mr. Pagan-Lopez was not speeding away from the residence, beginning to speed away upon the officers' arrival, or even showing any signs of nervousness, surprise, furtive movement before the seizure. In short, there was no evidence of flight or evasion. Finally, Mr. Pagan-Lopez was at the end of the street at the intersection, not 100 to 150 feet away from the "crime scene" like the individuals in *Robertson* or *Rawlings*. Mr. Pagan-Lopez could have come from at least eight other houses, had turned around in the dead-end street, or briefly pulled

over for a variety of reasons. This comparison to the facts in *Robertson*, *Rawlings*, and *Kessler* demonstrates the absence of any objectively reasonable facts to support a particularized suspicion that the vehicle and its occupants were involved in criminal activity related to the silent residential alarm. The district court therefore erred by holding the traffic stop was lawful.

2. The Discovery Of The Arrest Warrant Did Not Purge The Taint Of The Unlawful Stop And Therefore The Evidence Should Be Suppressed

Due to the unlawful traffic stop, Mr. Pagan-Lopez asserts the evidence found during law enforcement's search at the jail must be suppressed. "The exclusionary rule requires the suppression of both 'primary evidence obtained as a direct result of an illegal search or seizure' and, pertinent here, 'evidence later discovered and found to be derivative of an illegality,' the proverbial 'fruit of the poisonous tree.'" *State v. Cohagan*, 162 Idaho 717, 720 (2017) (quoting *Segura v. United States*, 468 U.S. 796, 804 (1984)). Here, the district court did not consider or apply the exclusionary rule because it held that the stop was lawful. (*See* Tr. Vol. I, p.12, L.12–p.18, L.23 (district court's oral ruling).) The parties, however, presented argument on the exclusionary rule and, in particular, one of its exceptions: the attenuation doctrine. (*See* Tr. Vol. I, p.4, L.10–p.10, L.2, p.10, L.4–p.12, L.11; R., pp.51–52.) Now on appeal, Mr. Pagan-Lopez submits this Court has the necessary factual findings to rule on the attenuation doctrine. Alternatively, he respectfully requests this Court remand this case for the district court to make the requisite findings and apply this doctrine.

a. *The discovery of an arrest warrant did not break the causal chain between the unlawful traffic stop and the discovery of evidence*

The attenuation doctrine "allows evidence to be admitted 'when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some

intervening circumstance, so that the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.'" *Cohagan*, 162 Idaho at 721 (quoting *Utah v. Strieff*, 136 S. Ct. 2056, 2061 (2016)). "There are three factors for a court to consider when determining whether unlawful conduct has been adequately attenuated." *State v. Page*, 140 Idaho 841, 846 (2004). "Those factors are: '(1) the elapsed time between the misconduct and the acquisition of the evidence, (2) the occurrence of intervening circumstances, and (3) the flagrancy and purpose of the improper law enforcement action.'" *Cohagan*, 162 Idaho at 722 (quoting *Page*, 140 Idaho at 846). "The state bears the burden of showing the attenuation such that the statements were sufficiently an act of free will purging the primary taint." *State v. Fenton*, No. 44546, 2017 Opinion No. 48, p.4 (Ct. App. 2017), *petition for review pending*.

The first factor, elapsed time, weighs in favor of suppression. The relevant time period is the time between misconduct (the unlawful traffic stop) and the acquisition of the evidence (the search of Mr. Pagan-Lopez at the jail). *See Strieff*, 136 S. Ct. at 2062; *Cohagan*, 162 Idaho at 722. "This factor favors attenuation unless 'substantial time' elapses between an unlawful act and when the evidence is obtained." *Strieff*, 136 S. Ct. at 2062 (citing *Kaupp v. Texas*, 538 U.S. 626, 633 (2003) (per curiam)). A "short time interval," such as a few minutes or a couple of hours, favors suppression. *Strieff*, 136 S. Ct. at 2062 (citing *Brown v. Illinois*, 422 U.S. 590, 604 (1975) (elapsed time of "less than two hours" favored suppression)). Here, the district court found the traffic stop occurred between 5:11 and 5:14 a.m. (Tr. Vol. I, p.13, Ls.3–5.) The incident report states Mr. Pagan-Lopez arrived at the jail at 6:00 a.m. (State's Ex. 2.) The search

occurred in the intake room, presumably shortly after Mr. Pagan-Lopez's arrival at the jail.[4] (Prelim. Hr'g Tr., p.5, L.5.) Therefore, a substantial time did not elapse between the unlawful traffic stop and the discovery of evidence at the jail. The short period of time warrants suppression.

The second factor, the intervening circumstance, favors the State. "The discovery of an arrest warrant as an intervening circumstance 'strongly favors the State.'" *Cohagan*, 162 Idaho at 722 (quoting *Strieff*, 136 S. Ct. at 2062). Here, Mr. Pagan-Lopez does not dispute the valid arrest warrant. (Prelim. Hr'g Tr., p.14, Ls.3–14; Tr. Vol. I, p.11, Ls.18–19 (defense counsel conceding valid warrant).) Therefore, this favor weighs in favor of attenuation.

Finally, the third factor, flagrancy and purpose of improper police action, favors suppression. In *Strieff*, the U.S. Supreme Court held that an officer's unlawful conduct in stopping an individual who had exited a suspected drug house and walked to a nearby store to be "an isolated instance of negligence that occurred in connection with a bona fide investigation of a suspected drug house." 136 S. Ct. at 2063. This conduct, though unconstitutional, did not favor exclusion. *Id.* On the other hand, in *Cohagan*, this Court held that the officers' conduct was flagrant. 162 Idaho at 723–26. There, an officer stopped an individual, knowing he was not the person the officers suspected, and ran a warrants check for "simply no reason." *Id.* at 723–24. In holding the officers' conduct was a "suspicionless fishing expedition" and thus "untenable," this Court emphasized that such police conduct must be deterred. *Id.* at 724–26. This Court stated its decision "should remove any lingering doubt as to whether this Court will sanction the unjustified, suspicionless seizure of citizens. It is difficult to imagine how similar conduct,

[4] The district court did not make a specific finding on the time of the search. Mr. Pagan-Lopez's counsel represented in his briefing that the search occurred at 6:06 a.m. (R., p.50.)

following the release of this opinion, can be characterized as anything but purposeful or flagrant." *Id.* at 726. Here, the officers' conduct falls closer to *Cohagan* than *Strieff*. The officers engaged in an unjustified, suspicionless seizure of the vehicle and its occupants simply because the vehicle was in the vicinity of a silent residential alarm. Tolerating this conduct would inform law enforcement that they may train future officers to conduct traffic stops with less than reasonable suspicion in the hopes that they discover an arrest warrant. *See id.* at 724–26 (discussing "implicit component" of exclusionary rule that its application influences officer training). In other words, law enforcement would understand that "this Court will apply the apply the attenuation doctrine to excuse a constitutional violation in the event that a fishing expedition proves successful." *Id.* at 725.

"In summary, although the discovery of the arrest warrant strongly favors attenuation, the other two factors support a finding of suppression." *Id.* at 726. If the Court considers the attenuation doctrine, it should "hold that the discovery of the evidence was not sufficiently attenuated from the illegal stop as to break the causal chain between the unconstitutional stop and the discovery of the evidence." *Id.* Therefore, the district court erred by denying Mr. Pagan-Lopez's motion to suppress.

II.

The District Court Abused Its Discretion By Rejecting Mr. Pagan-Lopez's Guilty Plea

A. Introduction

Mr. Pagan-Lopez argues the district court abused its discretion by rejecting his knowing, voluntary, and intelligent guilty plea to possession of a controlled substance. The district court rejected his plea because it would not allow Mr. Pagan-Lopez to waive an affirmative defense and because it believed the existence of an affirmative defense negated Mr. Pagan-Lopez's

factual basis for the crime. An affirmative defense, however, can be waived by the defendant as part of the entry of plea. Further, a factual basis is not required for a valid guilty plea, but, even if it was, Mr. Pagan-Lopez provided one. Mr. Pagan-Lopez desired to accept the State's plea offer, waive a weak affirmative defense, and plead guilty. The district court abused its discretion by refusing his plea and thus preventing him from accepting the State's plea offer.

B. Standard Of Review

> In considering a claimed abuse of discretion, this Court applies a three-factor test focusing upon: (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the boundaries of its discretion and consistent with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason.

Schoger v. State, 148 Idaho 622, 627 (2010).

C. The District Court Did Not Act Consistently With The Applicable Legal Standards When It Rejected Mr. Pagan-Lopez's Knowing, Voluntary, and Intelligent Guilty Plea Due A Potential, Yet Waived, Affirmative Defense

The district court's decision whether to accept a guilty plea is discretionary. *Schoger v. State*, 148 Idaho 622, 627, 630 (2009); *see also Santobello v. New York*, 404 U.S. 257, 262 (1971) ("A court may reject a plea in exercise of sound judicial discretion.").[5] To properly exercise its discretion and accept or reject a guilty plea, the district court must determine the plea is knowingly, voluntarily, and intelligently made by the criminal defendant. *See, e.g.*, *State v. Carrasco*, 117 Idaho 295, 297–98 (1990); *State v. Williston*, 159 Idaho 215, 218 (Ct. App. 2015). In addition, the district court must comply with the requirements of Idaho Criminal Rule

[5] The district court has discretion to accept or reject a plea because a defendant "does not have an absolute right under the Constitution to have his guilty plea accepted by the court." *North Carolina v. Alford*, 400 U.S. 25, 38 (1970). Similarly, the Idaho Criminal Rules do not require the district court to accept a guilty plea. *Schoger*, 148 Idaho at 630.

("I.C.R.") 11(c). *Williston*, 159 Idaho at 218. Rule 11(c) requires "the record and reasonable inferences" to show:

> (1) the voluntariness of the plea;
>
> (2) that the defendant was informed of the consequences of the plea, including minimum and maximum punishments, and other direct consequences that may apply;
>
> (3) that the defendant was advised that, by pleading guilty, the defendant would waive the right against compulsory self-incrimination, the right to trial by jury, and the right to confront witnesses against the defendant;
>
> (4) that the defendant was informed of the nature of the charge against the defendant; and
>
> (5) whether any promises have been made to the defendant, or whether the plea is a result of any plea bargaining agreement, and if so, the nature of the agreement and that the defendant was informed that the court is not bound by any promises or recommendation from either party as to punishment.

I.C.R. 11(c). "[T]he validity of a plea is to be determined by considering all the relevant circumstances surrounding the plea as contained in the record." *State v. Hawkins*, 117 Idaho 285, 288 (1990).

Here, the district court abused its discretion by rejecting Mr. Pagan-Lopez's guilty plea. The facts, discussed below, show that Mr. Pagan-Lopez provided a knowing, voluntary, and intelligent guilty plea to the offense of possession of a controlled substance. The facts also show that Mr. Pagan-Lopez wished to waive a potential affirmative defense and take advantage of the State's plea offer. The district court did not act consistently with the applicable legal standards by refusing his guilty plea.

The district court began the plea colloquy by asking Mr. Pagan-Lopez, under oath, if he was mentally and physically fit to proceed with his guilty plea decision, if he was coerced or pressured to enter the plea, and if he wanted to enter the plea agreement and plead guilty.

(Tr. Vol. I, p.33, Ls.3–25.) All of his responses demonstrated his plea was knowingly, voluntarily, and intelligently made. (Tr. Vol. I, p.33, Ls.3–25.) Next, the district court read the charged offense of possession of a controlled substance and asked Mr. Pagan-Lopez, "How do you think you committed this offense?" (Tr. Vol. I, p.34, Ls.4–9.) He answered: "I pick it up on the street and put it on my socks and forget about it. I got arrested, and I end up over there with the substance." (Tr. Vol. I, p.34, Ls.10–12.) The district court clarified that by "I pick it up" Mr. Pagan-Lopez meant "methamphetamine" and that he knew it was a controlled substance, though he did not know "exactly" what it was. (Tr. Vol. I, p.34, Ls.13–20.) The district court then asked if Mr. Pagan-Lopez's intention was "to possess that, to keep it." Mr. Pagan-Lopez answered, "My intention was to throw it away, but I didn't find the right place to throw it away." (Tr. Vol. I, p.34, Ls.23–24.) The district court asked Mr. Pagan-Lopez "how long did you possess it?" (Tr. Vol. I, p.34, L.25–p.35, L.1.) He responded, "Your Honor, I put it on my socks, and I forgot about it. I don't remember how long -- several hours." (Tr. Vol. I, p.35, Ls.2–3.) The district court then asked, "Do you believe you had any lawful reason to have it?" (Tr. Vol. I, p.35, Ls.4–5.) Mr. Pagan-Lopez answered, "I did no time [sic], no reason to have it, other than I found it, and there was a lot of kids around the area that I found it, and I just grab it and throw it away later in the right place, and I forgot about it." (Tr. Vol. I, p.35, Ls.6–9.)

Based on these statements, the district court rejected Mr. Pagan-Lopez's guilty plea. The district court stated, "I don't believe that that's a provident plea. He's asserting a defense that he had a lawful reason to possess it, to dispose of it. Given those explanations, I don't think that he's admitted every element of the offense, so I don't think that's a provident plea." (Tr. Vol. I, p.35, Ls.10–15.) After some comments by the State on the elements of the offense, the district court stated:

> Here's my concern related to the instructions. In the standard instruction 421, a person has possession of something if the person knows it's present and has physical control of it, so while *I do agree he's admitted that he possessed controlled substance,* possession can include holding an item. *My concern is that his statements give rise to a necessity defense,* which is defined in Idaho Code Standard Instruction 512, where a defendant cannot be guilty of a named crime if the defendant acted because of necessity and what he's saying is he picked it up because he knew it was methamphetamine[,] there were children around[,] and he was going to dispose of it to protect those children.
>
> Conduct which violates the law is justified by necessity if there is a specific threat of immediate harm to the defendant or another person. The defendant did not bring about the circumstances which created the threat of the immediate harm. He's not saying it was his methamphetamine. He said, you know, he came upon it and was picking it up to protect small children, that the defendant could not have prevented the threatened harm by a less offensive alternative. I think there is an issue, but, again, that would be an issue for the jury to determine beyond a reasonable doubt, and that the harm caused by violating the law was less than the threatened harm.
>
> So my concern is that, given his statements, *there may be a defense to this particular offense,* and he has not admitted that he planned to continue to possess it, and *I do understand that possession in the interim could be a lawful violation,* but, as stated, I'm not going to twist his arm to enter a guilty plea if he thinks that he was protecting small children by his behavior, and so *I'm not willing to accept a plea on the eve of trial*,[6] *given his statements to the court under oath.*

(Tr. Vol. I, p.36, L.12–p.37, L.22 (emphasis added).) The district court then confirmed with Mr. Pagan-Lopez that he "got nervous" with the police officers and "completely forgot" about the methamphetamine until the jail search. (Tr. Vol. I, p.38, L.15–p.39, L.6.) After this discussion, Mr. Pagan-Lopez's trial counsel informed the district court:

> Your Honor, I would say that *I have discussed with my client this issue* in that his potential defense of necessity at trial and whether he would like to go to trial with a necessity with possibly posing the necessity defense, or take a plea deal in this case, and *he has indicated to me that he would like to take the plea deal if the court is willing to accept it and forgo trial*. That's my understanding of my client's wishes at this point in time.

[6] This hearing was held on March 23, 2017, and trial was set for eleven days later on April 3, 2017. (Tr. Vol. I, p.20, Ls.10–12.)

(Tr. Vol. I, p.39, Ls.9–17 (emphasis added).) Trial counsel also recognized that, in another case, the defendant prevailed in a post-conviction appeal for trial counsel's failure to request a jury instruction on the necessity defense,[7] but emphasized,

> I think my facts are a lot hard[er] to get to, given the time of the morning, my client's just now statement under oath that proving that there were children present, essentially, in the middle of the night, would be very hard burden, and my client would like to preserve the plea offer in this case.

(Tr. Vol. I, p.39, L.18–p.40, L.4.) After trial counsel's response, the district court asked Mr. Pagan-Lopez:

> Q. Mr. Pagan-Lopez, look, I don't want to twist your arm to enter a guilty plea. This case is set for trial. We will try the case. If you want to present the evidence that you've told me here today to a jury, they certainly have the ability to weigh and determine that, so I don't want you to feel like you're being pressured into entering a plea. *Do you want to enter a guilty plea today*?
>
> A. *I do.*

(Tr. Vol. I, p.40, Ls.6–14 (emphasis added).) But, instead of accepting Mr. Pagan-Lopez's guilty plea, the district court informed the parties that it would accept an *Alford* plea, "if the parties are willing to do that." (Tr. Vol. I, p.40, Ls.15–26.) The State was not "willing to . . . offer" an *Alford* plea. (Tr. Vol. I, p.40, L.29–p.41, L.7.) "So, with that," the district court said,

> I don't find his statements to be provident as it goes to a plea, that there is a defense that's available. I recognize that under *North Carolina* [*v.*] *Alford*, people may elect to take a plea rather than go to trial in evaluating potential outcomes, but, given the fact that he's not willing to admit that it was not lawful possession, I am not willing to take his plea at this point.

[7] This post-conviction appeal, *Payne v. State*, 159 Idaho 879 (Ct. App. 2016), had the same district court judge as the instant case. In *Payne*, the district court summarily dismissed the defendant's petition for post-conviction relief, which raised, among other claims, an ineffective assistance of counsel claim for failing to raise the defense of misfortune or accident and request that jury instruction. *Id.* at 880. The Court of Appeals disagreed and held the dismissal of this claim was in error. *Id.* at 884–85.

(Tr. Vol. I, p.41, Ls.8–15.) After some discussion of trial issues, Mr. Pagan-Lopez's counsel reiterated his client's desire to enter a guilty plea. He stated,

> Just as much as it is work, since my client did make the statement that he would like the court to accept his plea in this case, I would just note that my client did provide a factual basis for the plea. He does have a possible defense of necessity. *My client has expressed to me that he would like the plea agreement in lieu of going to trial.* In exchange for his plea agreement, he is getting a count [(introduction of major contraband)] dismissed.
>
> My client has a right to plead guilty. I don't think there's necessarily a factual element not met by his recitation. *There is a defense that he could potentially use at trial and present to the jury and we understand that, but it's still my understanding that he wanted to take advantage of the plea offer in this case and that he did admit to knowingly possessing methamphetamine.*

(Tr. Vol. I, p.46, Ls.1–16 (emphasis added).) The district court responded, "I know. It's the issue related to the unlawfulness, and, quite frankly, the deals on the eve of trial, I spend all of my time doing them in postconviction, so we might as well just go to trial in the first place." (Tr. Vol. I, p.46, Ls.17–21.) The district court concluded that, "if he has any different reflections about the lawfulness of that possession," "you can set it on the court's calendar." (Tr. Vol. I, p.46, Ls.23–25.)

These facts unequivocally show that Mr. Pagan-Lopez desired to enter a guilty plea. These facts also show that the district court misapplied the relevant legal standards in two related ways. First, it would not let Mr. Pagan-Lopez voluntarily and knowingly waive an affirmative defense and accept the State's offer. Second, it believed the existence of a potential affirmative defense negated Mr. Pagan-Lopez's admission to the commission of the crime and, without a clear factual basis, it could not accept the plea. Both rulings were inconsistent with the legal standards.

1. A Valid Guilty Plea Waives An Affirmative Defense

The district court did not act consistently with the applicable standards when it prohibited Mr. Pagan-Lopez from waiving an affirmative defense. It is well established that "a valid guilty plea, waives all nonjurisdictional defects and defenses, whether constitutional or statutory." *State v. Coffin*, 104 Idaho 543, 546 (1983); *see also State v. Fowler*, 105 Idaho 642, 643 (Ct. App. 1983). Here, Mr. Pagan-Lopez identified the potential affirmative defense of necessity and clearly desired to waive it. There was no indication that his guilty plea and accompanying waiver were coerced or otherwise involuntary. Even after the district court expressed its concerns, Mr. Pagan-Lopez repeated his intention to plead guilty. (Tr. Vol. I, p.40, Ls.6–14.) He also informed the district court that he believed the defense was weak and would be very hard to prove at trial.[8] (Tr. Vol. I, p.39, L.18–p.40, L.4.) At trial, Mr. Pagan-Lopez would have the burden of production for the defense. *State v. Camp*, 134 Idaho 662, 666 (Ct. App. 2000) (defense has the burden of production for a necessity defense). If he failed to make a prima facie showing of the elements of the defense, he would not have the right to present his defense to the jury. *State v. Chisholm*, 126 Idaho 319, 321 (Ct. App. 1994) (no right to present affirmative defense at trial without prima facie showing of elements); *see also State v. Howley*, 128 Idaho 874, 878–79 (1996) (no error in exclusion of necessity defense). Since this defense was Mr. Pagan-Lopez's burden to produce, he can freely waive it through a valid guilty plea. It is an abuse of discretion for the district court to force a defendant to go to trial, despite a knowing, voluntary, and intelligent plea, because the district court believes the defendant has a potential, yet knowingly waived, affirmative defense to the charge. The district court did not act

[8] Mr. Pagan-Lopez's prediction proved correct. The jury convicted him, despite the presentation of a necessity defense. (*See* R., p.99 (necessity defense jury instruction).)

consistently with the legal standards by refusing to accept a guilty plea because "there may be a defense." (Tr. Vol. I, p.37, L.14.)

2. A Valid Guilty Plea Does Not Require A Factual Basis

Second, the district court did not act consistently with the applicable legal standards when it reasoned that it could not accept the plea because the element of "unlawful possession" was not satisfied by Mr. Pagan-Lopez's admission of guilt. (*See* Tr. Vol. I, p.35, Ls.10–15, p.41, Ls.8–15.) "There is no requirement that the trial court must establish a factual basis for the crimes charged prior to accepting a guilty plea." *Hawkins*, 117 Idaho at 290 (citing *Coffin*, 104 Idaho at 545). This principle is also well established. *See, e.g.*, *State v. Dopp*, 124 Idaho 481, 484 (1993); *State v. West*, 100 Idaho 16, 17 (1976); *Williston*, 159 Idaho at 217. "[A] valid guilty plea, voluntarily and understandingly given, is a judicial admission of all facts charged by the indictment or information." *Hawkins*, 117 Idaho at 290 (citing *State v. Tipton*, 99 Idaho 670, 673 (1978)). Therefore, Mr. Pagan-Lopez's valid guilty plea was all that was required for the district court to accept it. The district court did not need a factual basis. Nor did it need to inquire and rule out potential defenses. *State v. Colyer*, 98 Idaho 32, 36 n.5 (1976) ("I[t] is unnecessary, however, for the trial court to enumerate each defense which is or is not waived. For the sake of expediency, it is sufficient if the trial court informs the accused that by pleading guilty he waives any defenses he may have to the offense charged."). The district court did not act consistently with the legal standards by rejecting Mr. Pagan-Lopez's guilty plea because it believed he did not admit "every element of the offense." (Tr. Vol. I, p.35, Ls.10–15.)

That being said, Mr. Pagan-Lopez actually provided the district court with a factual basis for his guilty plea. Mr. Pagan-Lopez said, under oath, he knowingly possessed a controlled substance. (Tr. Vol. I, p.34, L.4–p.35, L.9.) Although he said he forgot about the

methamphetamine in his sock, those statements go to the necessity defense, not the elements of the crime itself. "The necessity defense is based on the premise that 'a person who is compelled to commit an illegal act in order to prevent a greater harm should not be punished for that act.'" *State v. Tadlock*, 136 Idaho 413, 414 (Ct. App. 2001) (quoting *State v. Hastings*, 118 Idaho 854, 855 (1990)). While the crime is justifiable due to a necessity, the person still committed the illegal act. So, even if Mr. Pagan-Lopez was justified in his methamphetamine possession, he knowingly possessed it nonetheless and committed the crime. The district court did not act consistently with the legal standards by ruling a potential necessity defense negated the elements of the offense.

Along the same lines, the district court abused its discretion by requiring "unlawful possession." (*See* Tr. Vol. I, p.41, Ls.8–15.) "Unlawful" possession is not an element of the offense. The elements of possession of a controlled substance are possession and knowledge. *State v. Goggin*, 157 Idaho 1, 7–8 (2014); *State v. Blake*, 133 Idaho 237, 240 (1999). Mr. Pagan-Lopez's plea colloquy satisfied those elements. Whether his possession was "lawful," *i.e.*, justifiable or excusable by some defense, does not bear on his admission to the crime. The district court did not act consistently with the applicable legal standards by holding that Mr. Pagan-Lopez did not establish a factual basis for his guilty plea.

3. The District Court's Rejection Of Mr. Pagan-Lopez's Guilty Plea Prejudiced Him

Finally, the State cannot prove this error was harmless. As part of the plea agreement, the State agreed to dismiss the charge of introduction of major contraband and to recommend probation, with an underlying sentence of five years, with two years fixed. (Tr. Vol. I, p.27, Ls.6–16.) Because the district court rejected his plea, Mr. Pagan-Lopez did not receive the benefit of the State's offer. The jury found Mr. Pagan-Lopez guilty of both offenses, and

Mr. Pagan-Lopez now has two felony convictions instead of one. (Tr. Vol. I, p.277, Ls.6–25; R., p.105.) At sentencing, the State did not recommend probation. (Tr. Vol. II, p.8, Ls.3–8.) The district court sentenced Mr. Pagan-Lopez to less fixed time than the State would have recommended as part of the plea agreement (one fixed year instead of two), but imposed the same indeterminate time of five years. (Tr. Vol. II, p.14, Ls.3–10; R., pp.109–12.) Mr. Pagan-Lopez also received a concurrent sentence of two and one-half indeterminate years for introduction of major contraband. (Tr. Vol. II, p.14, Ls.3–10; R., pp.109–12.) The district court did not place Mr. Pagan-Lopez on probation, but rather retained jurisdiction. (Tr. Vol. II, p.15, Ls.1–5.) Hence, Mr. Pagan-Lopez was in custody throughout the criminal proceedings plus another seven months for the period of retained jurisdiction. (R., pp.109–112 (judgment of conviction with 189 days of credit); Aug. R., pp.1–3 (judgment after retained jurisdiction).) Although he was eventually placed on probation, (Aug. R., pp.1–3), Mr. Pagan-Lopez was incarcerated far longer than if he had been allowed to plead guilty and proceed to sentencing, where he may have received a suspended sentence and probation upon the State's recommendation. Therefore, the State cannot the district court's improper rejection of Mr. Pagan-Lopez's guilty plea was harmless.

III.

Mr. Pagan-Lopez's Convictions And Punishments For Possession Of A Controlled Substance And Introduction Of Major Contraband Into The Jail Violated His Right To Be Free From Double Jeopardy

A. Introduction

Mr. Pagan-Lopez argues his right to be free from double jeopardy pursuant to the Idaho Constitution was violated because he was convicted and punished for both a greater and lesser

included offense. Under the pleading theory, the charged offense of possession of a controlled substance was a lesser included offense of introduction of major contraband. The duplicative convictions and punishments for the greater and lesser included offense resulted in a clear violation of Mr. Pagan-Lopez's unwaived constitutional right, and this constitutional error was not harmless.

B. Standard Of Review

As a question of law, this Court exercises free review over whether a defendant's "prosecution complies with the constitutional protection against being placed in jeopardy twice." *State v. Santana*, 135 Idaho 58, 63 (Ct. App. 2000).

C. Mr. Pagan-Lopez's Unwaived Constitutional Right To Be Free From Double Jeopardy Was Clearly Violated Because Two Convictions And Punishments Were Imposed For A Greater And Lesser Included Offense

Mr. Pagan-Lopez did not raise this double jeopardy claim below, and therefore he raises it for the first time on appeal as a fundamental error. *State v. Perry*, 150 Idaho 209, 225 (2010). The fundamental error doctrine places the burden on the defendant to show the alleged error: "(1) violates one or more of the defendant's unwaived constitutional rights; (2) plainly exists (without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision); and (3) was not harmless." *Id.* at 228. Here, Mr. Pagan-Lopez's alleged error meets this test. First, the error violated his unwaived right under the Idaho Constitution to be free from double jeopardy. Second, the error is clear the record and not the product of a strategic or tactical decision. Third, the error was not harmless because the error affected Mr. Pagan-Lopez's substantial rights and

the outcome of the proceedings. Each prong of the fundamental error test will be addressed below.

1. Possession Of A Controlled Substance Was A Lesser Included Offense Of Introduction Of Major Contraband Into The Jail, And Thus Multiple Punishments For This Offense Violated Mr. Pagan-Lopez's Unwaived Double Jeopardy Rights

"The double jeopardy clause of the Idaho Constitution states: 'No person shall be twice put in jeopardy for the same offense.'" *State v. Sepulveda*, 161 Idaho 79, 87 (2016) (quoting IDAHO CONST. art. I, § 13). "The Double Jeopardy Clause of the Idaho and United States Constitutions affords a defendant three basic protections. It protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple criminal punishments for the same offense." *State v. Corbus*, 151 Idaho 368, 370 (Ct. App. 2011) (quoting *Schiro v. Farley*, 510 U.S. 222, 229 (1994); *State v. McKeeth*, 136 Idaho 619, 624 (Ct. App. 2001)). The third type of protection—against multiple punishments for the same offense—is at issue here. Under Idaho's double jeopardy clause, "a defendant may not be convicted of both a greater and lesser included offense." *Sepulveda*, 161 Idaho at 87 (quoting *State v. McKinney*, 153 Idaho 837, 841 (2013)). Punishment for both the lesser and greater included offense violates the Idaho Constitution. *State v. Moad*, 156 Idaho 654, 658 (Ct. App. 2014) (citing *State v. Thompson*, 101 Idaho 430, 434–35 (1980)).

Under the Idaho Constitution, the appellate courts use the pleading theory "to determine whether one offense is a lesser-included offense of the other." *Id.* at 658 (citing *Thompson*, 101 Idaho at 434–35). "This theory holds 'that an offense is an included offense if it is alleged in the information [or indictment] as a means or element of the commission of the higher offense.'" *State v. Flegel*, 151 Idaho 525, 529 (2011) (alteration in original) (quoting *Sivak v. State*, 112 Idaho 197, 211 (1986)). "Under this pleading theory, a court must consider whether the terms of

the charging document allege that both offenses arose from the same factual circumstances such that one offense was the means by which the other was committed." *Moad*, 156 Idaho at 658 (citing *Thompson*, 101 Idaho at 435; *McKinney*, 153 Idaho at 841; *State v. McCormick*, 100 Idaho 111, 115 (1979); *State v. Anderson*, 82 Idaho 293, 301 (1960)). "An 'included offense' is one which is necessarily committed in the commission of another offense; or one, the essential elements of which are charged in the information as the manner or means by which the offense was committed." *Thompson*, 101 Idaho at 434 (quoting *State v. Hall*, 86 Idaho 63, 69 (1963)).

Here, Mr. Pagan-Lopez was charged with two offenses arising from the same factual circumstances. The Information charged:

> COUNT I
>
> That the defendant, CARLOS ENRIQUE PAGAN-LOPEZ, on or about the 2nd day of December, 2016, in the County of Ada, State of Idaho, did unlawfully possess a controlled substance, to-wit: Methamphetamine, a Schedule II controlled substance.
>
> COUNT II
>
> That the defendant, CARLOS ENRIQUE PAGAN-LOPEZ, on or about the 2nd day of December, 2016, did knowingly and unlawfully introduce and/or attempt to introduce major contraband to-wit: Methamphetamine, a Schedule II controlled substance into a correctional facility or the grounds of a correctional facility without permission of the facility head.

(R., p.32.) Examining these two charges, Mr. Pagan-Lopez's possession of a controlled substance was the means or manner by which he committed the offense of introduction of major contraband into a correctional facility. The Information alleges that "both offenses arose from the same factual circumstances such that [possession of a controlled substance] was the means by which [introduction of major contraband into a correctional facility] was committed." *Moad*, 156 Idaho at 658. Both offenses are entirely based on the same factual predicate of law enforcement finding the baggie of methamphetamine in Mr. Pagan-Lopez's sock at the jail on December 2.

"The language used in both counts lays out the same factual circumstances as the basis for each offense." *Corbus*, 151 Idaho at 375. Mr. Pagan-Lopez introduced methamphetamine into the jail by possessing that same methamphetamine. He could not have committed the offense of introduction of methamphetamine into the jail without also committing the offense of possession of methamphetamine. Put another way, his possession of the methamphetamine was necessary for him to introduce it into the jail. Therefore, under the pleading theory, possession of a controlled substance was a lesser included offense of introduction of major contraband into a correctional facility.

Mr. Pagan-Lopez was prosecuted, convicted, and punished for both the lesser and greater offense. This was violation of his unwaived right under the Idaho Constitution to be free from double jeopardy. *See Moad*, 156 Idaho at 658. As such, Mr. Pagan-Lopez has met his burden under the first prong of the fundamental error test.

2. The Error Is Clear And Obvious From The Record

Mr. Pagan-Lopez further submits the second prong of the fundamental error test is satisfied. To review a double jeopardy violation under the pleading theory, the appellate courts examine the charging document: "[W]hether one crime is a lesser included offense of another crime can be determined from the face of the record simply by reading the information charging each crime." *Sepulveda*, 161 Idaho at 87 (quoting *McKinney*, 153 Idaho at 841). As such, there is no need for information outside of the record. Further, there is no tactical or strategic reason for trial counsel to fail to object to a clear violation of the defendant's constitutional rights. The right to be protected from double jeopardy is so fundamental that is expressed in the Idaho Constitution, and I.C. § 19-2312 codifies the pleading theory. *See Thompson*, 101 Idaho at 433–34 (discussing I.C. § 19-2312); *Anderson*, 82 Idaho at 300–03 (same). Mr. Pagan-Lopez gained

no tactical or strategic advantage by being convicted and punished for the greater and lesser included offense. Additionally, there is no indication that trial counsel waived the double jeopardy violation. Thus, Mr. Pagan-Lopez asserts the error plainly exists.

3. The Error Is Not Harmless

Finally, Mr. Pagan-Lopez contends the third prong of the fundamental error test is met. Under *Perry*, the defendant must show the error is not harmless, that is, "there is a reasonable possibility that the error affected the outcome of the trial." 150 Idaho at 226. Here, the double jeopardy violation affected the outcome because Mr. Pagan-Lopez was convicted, and subsequently sentenced, for two offenses instead of one. (Tr. Vol. I, p.277, Ls.6–25 (verdict); R., p.105 (verdict), pp.109–12 (judgment of conviction).) He would have one less felony conviction without the error. He would have a lesser punishment as well. The lesser included offense of possession of a controlled substance contains the harsher sentence of five years, with one year fixed. (R., pp.109–10.) Therefore, Mr. Pagan-Lopez has shown the error harmed him and affected his substantial rights to be free from double jeopardy. He respectfully requests this Court vacate his judgment of conviction for possession of a controlled substance.

IV.

The District Court Abused Its Discretion At Trial By Excluding Mr. Pagan-Lopez's Layperson Testimony Of His Mental Health

A. Introduction

Mr. Pagan-Lopez asserts the district court abused its discretion when it excluded his testimony about his mental condition. Specifically, he contends the district court did not act consistently with the legal standards under I.C. § 18-207. This statute requires notice of evidence from an expert witness on mental condition. It does not restrict a layperson's testimony on

mental condition. By ruling this statute barred Mr. Pagan-Lopez from testifying about his own mental health condition, the district court abused its discretion.

B. Standard Of Review

> When reviewing the trial court's evidentiary rulings, this Court applies an abuse of discretion standard. To determine whether a trial court has abused its discretion, this Court considers whether it 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.

State v. Anderson, 162 Idaho 610, 614–15 (2017) (citations and quotation marks omitted). Statutory interpretation is reviewed de novo. *State v. Owens*, 158 Idaho 1, 3 (2015).

C. The District Court Did Not Act Consistently With The Applicable Legal Standards When It Required Mr. Pagan-Lopez To Give The State Notice Of His Layperson Testimony On His Mental Health Condition

Idaho Code § 18-207 states, "Mental condition shall not be a defense to any charge of criminal conduct." I.C. § 18-207(1). This rule, however, is not "intended to prevent the admission of expert evidence on the issue of any state of mind which is an element of the offense, subject to the rules of evidence." I.C. § 18-207(3). "That is, a defendant may present evidence of a mental disease or defect to negate the intent or other *mens rea* element of the charged crime." *State v. Santistevan*, 143 Idaho 527, 529–30 (Ct. App. 2006) (citing *State v. Searcy*, 118 Idaho 632, 635–36 (1990); *State v. Beam*, 109 Idaho 616, 621 (1985); *State v. Patterson*, 126 Idaho 227, 229 (Ct. App. 1994)).

The issue in this case pertains to the interpretation of I.C. § 18-207's strict notice requirements. It states in part:

> (4) No court shall, over the objection of any party, receive the evidence of any expert witness on any issue of mental condition, or permit such evidence to be

> placed before a jury, unless such evidence is fully subject to the adversarial process in at least the following particulars:
>
> (a) Notice must be given at least ninety (90) days in advance of trial, or such other period as justice may require, that a party intends to raise any issue of mental condition and to call expert witnesses concerning such issue, failing which such witness shall not be permitted to testify until such time as the opposing party has a complete opportunity to consider the substance of such testimony and prepare for rebuttal through such opposing expert(s) as the party may choose.
>
> (b) A party who expects to call an expert witness to testify on an issue of mental condition must, on a schedule to be set by the court, furnish to the opposing party a written synopsis of the findings of such expert, or a copy of a written report. The court may authorize the taking of depositions to inquire further into the substance of such reports or synopses.

I.C. § 18-207(4)(a)–(b). "The admission of expert testimony is conditioned upon proper notice so as to allow the opposing party a complete opportunity to consider the substance of such testimony and prepare for rebuttal." *State v. Arrasmith*, 132 Idaho 33, 42 (Ct. App. 1998) (citing I.C. § 18-207(4)(a)).

Here, the district court interpreted these notice requirements to bar Mr. Pagan-Lopez from testifying about his own mental condition. The district court reasoned,

> Nothing in 18-207 prevents admission of expert evidence on the issue of state of mind, which is an element of an offense, but it's subject to the rules of evidence. 18-207(4) prevents the court, because the statute says "shall." "No court shall over the objection of any party receive the evidence of any expert witness on any issue of mental condition or permit such evidence to be placed before a jury unless such evidence was fully subject to the adversarial process in at least the following particulars." It requires 90 days of notice in advance of trial under (A). (B), if it's an expert witness requires a written report, waives any medical privilege and then provides the provisions for appointment of such expert if the defendant is indigent. So to that extent, I do not find that the rules related to presentation of evidence on a physical or mental impairment under 18-207 have been meant, so since there was no notice, I will not permit inquiry on those issues.
>
> . . . .
>
> 18-207 addresses, not only expert testimony, and, (4), presents it through evidence of an expert witness or permit such evidence to be placed before a jury, so it's not just limited to an expert. It's also limited to the defendant's own

> opinion of his medical condition, so I do believe the rule prohibits it without proper notice.

(Tr. Vol. I, p.200, L.11–p.201, L.4, p.201, 14–20.) This interpretation was in error. The notice requirements in I.C. § 18-207 govern evidence from an *expert* witness. They do not control testimony from a layperson. "Statutory interpretation begins with the statute's plain language. This Court considers the statute as a whole, and gives words their plain, usual, and ordinary meanings." *Owens*, 158 Idaho at 3. The pertinent language in this case states: "No court shall, over the objection of any party, receive *the evidence of any expert witness* on any issue of mental condition, or permit *such evidence* to be placed before a jury, unless *such evidence* is fully subject to the adversarial process in at least the following particulars . . . ." I.C. § 18-207(4) (emphasis added). Looking at the plain meaning, these notice requirements apply to "the evidence of any expert witness." It is clear that the two later references to "such evidence" refer back to the first reference of "the evidence of any expert witness." The district court erred by interpreting the second two references to "such evidence" as referring to any and all evidence of mental condition, by an expert or a layperson. The plain language of I.C. § 18-207(4) does not impose any notice requirement on layperson testimony of mental condition. This interpretation is further supported by the statute as a whole. Each subsection of the notice requirements in I.C § 18-207(4) refers to an expert or examiner. I.C. § 18-207(4)(a)–(e). There is no reference of layperson testimony or other layperson evidence. Only the evidence of an expert witness on mental condition is subject to the statute's notice requirements.

Due to the district court's erroneous interpretation of the statute, the district court failed to apply the correct legal standards when it excluded Mr. Pagan-Lopez's testimony about his mental health condition. Mr. Pagan-Lopez intended to testify in his defense that he suffered from "memory problems" and "epilepsy." (Tr. Vol. I, p.198, Ls.20–23.) His trial counsel explained,

> Your Honor, I believe that the defenses we have proposed, one being necessity and one being mistake or misfortune or accident of possessing the methamphetamine, that it will come to light as to why my client did not report the methamphetamine to law enforcement and still had it on his person and then did not report it to Officer Feldner and then did not report it to Officer Ellis or to Deputy Keber. It would be relevant to explain why he did not do that.

(Tr. Vol. I, p.199, Ls.6–14.) The district court did not address relevancy, but instead excluded the evidence due to Mr. Pagan-Lopez's failure to give notice to the State. (Tr. Vol. I, p.200, L.11-p.201, L.4, p.201, Ls.14–20.) This was in error because Mr. Pagan-Lopez, a layperson, did not have to give the State notice of his own testimony of his mental condition. The district court should have allowed Mr. Pagan-Lopez to provide this testimony. *See* Idaho Rule of Evidence ("I.R.E.") 701 (allowing layperson opinion testimony if certain factors are met); *Cf. Dodge-Farrar v. Am. Cleaning Servs. Co.*, 137 Idaho 838, 841–43 (Ct. App. 2002) (holding a layperson may testify to cause of medical condition if it is "within the usual and ordinary experience of the average person"). Accordingly, the district court abused its discretion because it failed to act consistently with the applicable legal standards, and the State cannot prove that this error was harmless.

V.

The District Court Abused Its Discretion By Ordering Mr. Pagan-Lopez To Pay Restitution For The State's Prosecution Costs

A. Introduction

Mr. Pagan-Lopez argues the district court abused its discretion by ordering him to pay $996.27 in restitution to the State for its cost to prosecute him. He contends the district court abused its discretion because the State failed to show with substantial and competent evidence

the costs actually incurred for prosecution. Due to the lack of evidence, this Court should vacate the district court's restitution order.

B. Standard Of Review

> To determine whether the district court abused its discretion, this Court evaluates whether the district court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion and consistently with relevant legal standards; and (3) reached its decision by an exercise of reason.

State v. Wisdom, 161 Idaho 916, 919 (2017). "What amount of restitution to award is a question of fact for the district court, 'whose findings will not be disturbed if supported by substantial evidence.'" *State v. Cunningham*, 161 Idaho 698, 700 (2017) (quoting *State v. Weaver*, 158 Idaho 167, 170 (Ct. App. 2014)).

C. The District Court Did Not Act Consistently With The Applicable Legal Standards Because The Evidence Was Insufficient To Prove The State's Costs Actually Incurred To Prosecute Mr. Pagan-Lopez

Idaho Code § 37-2732(k) "permits the State to recoup its prosecution costs as restitution." *State v. Nelson*, 161 Idaho 692, 695 (2017); *Cunningham*, 161 Idaho at 700. It reads 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.* . . . A conviction for the purposes of this section means that the person has pled guilty or has been found guilty, notwithstanding the form of the judgment(s) or withheld judgment(s).

I.C. § 37-2732(k) (emphasis added). Restitution under this statute is discretionary. *Nelson*, 161 Idaho at 695; *Cunningham*, 161 Idaho at 700. The district court may, in its discretion, order

restitution to county prosecuting attorney offices for "prosecution expenses actually incurred, including regular salaries of employees." I.C. § 37-2732(k). "As guidance concerning the correct interpretation of section 37-2732(k)," the Court noted "that section 37-2732(k), by its plain terms, grants discretion to award restitution to the State for prosecution expenses '*actually incurred*.'" *Nelson*, 161 Idaho at 697; *Cunningham*, 161 Idaho at 702. "At 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." *Nelson*, 161 Idaho at 697; *Cunningham*, 161 Idaho at 702. The restitution award must be supported by substantial and competent evidence. *Nelson*, 161 Idaho at 695; *Cunningham*, 161 Idaho at 700.

In two recent companion cases, *Nelson* and *Cunningham*, this Court clarified the evidentiary standards for the State's restitution request under this statute. In both *Nelson* and *Cunningham*, the State offered a one-paragraph form titled "Statement of Costs." *Nelson*, 161 Idaho at 695; *Cunningham*, 161 Idaho at 700. The Court found this form "problematic for several reasons." *Nelson*, 161 Idaho at 695; *Cunningham*, 161 Idaho at 700. It was a "boilerplate, fill-in-the-blank-style form" used by the State in other cases. *Nelson*, 161 Idaho at 695; *Cunningham*, 161 Idaho at 700. The form "merely" identified the defendant, case number, and prosecutor. *Nelson*, 161 Idaho at 695; *Cunningham*, 161 Idaho at 700. The form also stated the total number of attorney hours, the hourly rate, and sum total of the request, but did not "contain itemized time entries explaining the tasks performed or the expenditures made in the particular case." *Nelson*, 161 Idaho at 695–96; *Cunningham*, 161 Idaho at 700. In *Nelson* in particular, the form did not confirm that the State sought restitution for expenses actually incurred in the prosecution resulting in the defendant's conviction, and not the costs from a previous mistrial, acquittal of one charge, or prosecution of a co-defendant. 161 Idaho at 696. Finally, in both cases, neither

form was certified as correct. *Id.*; *Cunningham*, 161 Idaho at 700. Both consisted of unsworn statements with the prosecutor's signature. *Nelson*, 161 Idaho at 696; *Cunningham*, 161 Idaho at 700-01. Due to these deficiencies, the Court concluded the "Statement of Costs" forms were not substantial evidence upon which to base restitution for prosecution costs. *Nelson*, 161 Idaho at 697; *Cunningham*, 161 Idaho at 701-02.

Just like the forms in *Nelson* and *Cunningham*, the form here also fails to satisfy the substantial evidence standard to award restitution for prosecution costs. The "Certificate of Records" states:

> 1. I am employed by the Ada County Prosecuting Attorney and as such have access to payroll records maintained by Ada County in the regular course of its business.
>
> 2. I am aware that the Ada County Prosecutor's Office keeps records regarding the attorney time spent prosecuting drug cases in anticipation of submitting a request for restitution pursuant to I.C. § 37-2732(k).
>
> 3. I have reviewed the time log in this case, which documents the prosecutor time spent prosecuting the above referenced drug case. Jill Longhurst spent .3 hours working on this case, Heather Reilly spent .1 hours working on this case, James Vogt spent 1.3 hours working on this case, Kai Wittwer spent .1 hours working on this case, and Tanner Stellmon spent 16.5 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 $996.27.
>
> 4. Pursuant to Idaho Code §37-2732(k), the State requests restitution in the amount of $996.27.
>
> 5. The foregoing is true and correct to the best of my information and belief.

(R., pp.116–17.) The form was sworn and signed by this employee. (R., pp.116–17.) This form is "problematic for several reasons." *Nelson*, 161 Idaho at 695; *Cunningham*, 161 Idaho at 700. First, similar to *Nelson* and *Cunningham*, the form "merely" identifies Mr. Pagan-Lopez, the case number, and prosecutors. *Nelson*, 161 Idaho at 695; *Cunningham*, 161 Idaho at 700. There is no further description of the case, except that it qualifies for restitution as a "drug case."

(R., p.116.) Second, the employee avers she reviewed the time log, but there is no evidence pertaining to the verification or confirmation of that time from the prosecutors. The form indicates that this employee simply collected and input any time spent by any prosecutor that was attached to this case name or number. Third, and again similar to *Nelson* and *Cunningham*, the form does not "contain itemized time entries explaining the tasks performed or the expenditures made in the particular case." *Nelson*, 161 Idaho at 695–96; *Cunningham*, 161 Idaho at 700. Instead, the form refers to five different prosecutors "working on the case" without any additional explanation of the tasks performed or the date of the task. (R., pp.116–17.) Fourth, although the form is sworn and signed, it was done so, presumably, by an office administration or human resources employee, but certainly not any of the prosecutors. Finally, the employee said she applied the "applicable payroll rate" for five different prosecutors, but these unknown, undisclosed payroll rates may not be consistent with the "regular salaries" of each prosecutor, as required by the statute. I.C. § 37-2732(k). In fact, according to this form, the average payroll rate for the prosecutors is $54.44 per hour.[9] This is a salary of $113,235.20 per year.[10] The statute, however, "does not permit the recovery of what is 'reasonable'" for attorney fees. *Nelson*, 161 Idaho at 397; *Cunningham*, 161 Idaho at 702. The State can only recover "expenses actually incurred." *Nelson*, 161 Idaho at 397; *Cunningham*, 161 Idaho at 702. Based on these deficiencies, the "Certificate of Record" does not prove the State's prosecution costs with substantial and competent evidence. As required in *Nelson* and *Cunningham*, "measuring up to section 37-2732(k)'s burden to prove expenses actually incurred" requires "at a minimum" "sworn statements that delineate the time spent performing specific tasks." *Nelson*, 161 Idaho at 397; *Cunningham*, 161 Idaho at 702. The "Certificate of Record" falls short of this standard.

[9] $996.27 ÷ 18.3 hours (.3+.1+1.3+.1+16.5) = $54.44.

Therefore, the district court abused its discretion by ordering Mr. Pagan-Lopez to pay restitution to the State for its cost to prosecute him. The district court did not act consistently with the applicable legal standards because it did misapplied I.C. § 37-2732(k) and recent case law on the evidentiary standards for restitution. Properly applied, the State's "Certificate of Records" does not constitute substantial and competent evidence upon which to base a restitution award. As such, Mr. Pagan-Lopez respectfully requests this Court vacate the restitution award "for lack of evidence" and remand this case for further proceedings. *Cunningham*, 161 Idaho at 702.

CONCLUSION

Mr. Pagan-Lopez respectfully requests this Court reverse or vacate the district court's order denying his motion to suppress, his judgment of conviction, and remand this case for further proceedings on the suppression motion. Alternatively, he respectfully requests this Court vacate his judgment of conviction and remand this case with instructions to the district court to accept his guilty plea to possession of a controlled substance pursuant to the State's prior plea offer. In the alternative, he respectfully requests this Court vacate his judgment of conviction as to possession of a controlled substance due the double jeopardy violation. Alternatively, he respectfully requests this Court vacate his judgment of conviction in its entirety due to the district court's erroneous evidentiary ruling at trial. Finally, he respectfully requests this Court vacate the district court's restitution order and remand for further proceedings.

DATED this 16th day of February, 2018.

_____/s/_____

[10] $54.44 x 2,080 hours (52 weeks/year x 40 hours) = $113,235.20.

JENNY C. SWINFORD
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 16th day of February, 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:

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E-MAILED BRIEF

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E-MAILED BRIEF

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E-MAILED BRIEF

_____/s/_____
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Administrative Assistant

JCS/eas