5-15-2018

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

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 45269**
Plaintiff-Respondent,	)	
	)	**Ada County Case No.**
v.	)	**CR01-2016-41054**
	)	
CARLOS ENRIQUE PAGAN-LOPEZ,	)	
	)	
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

Carlos Enrique Pagan-Lopez appeals from his convictions for possession of methamphetamine, and for introducing and/or attempting to introduce major contraband into a jail facility. Pagan-Lopez claims the district court erred by 1) denying his motion to suppress; 2) rejecting his guilty plea; 3) excluding Pagan-Lopez's own opinion about his mental health; and 4) ordering restitution for the costs of prosecution. Pagan-Lopez also claims, for the first time on appeal, that his convictions violated his double jeopardy rights under the Idaho Constitution.

Statement Of The Facts And Course Of The Proceedings

Officers responded to an early-morning residential burglary alarm. (Prelim. Hr'g Tr., p.12, Ls.17-19.[1]) The location of the alarm was a dead-end street that Pagan-Lopez was driving away from, where he was the only vehicle on the street. (Prelim. Hr'g Tr., p.12, Ls.17 – p.13, L.10; p.17, Ls.3-16.) Officers stopped Pagan-Lopez's vehicle, discovered he had a felony arrest warrant, and transported him to jail. (Prelim. Hr'g Tr., p.13, L.11 – p.14, L.23.) During a jail search an officer also discovered that Pagan-Lopez had some methamphetamine hidden in his sock. (Tr. vol. I, p.160, L.23 – p.162, L.12; p.191, Ls.6-15.) The state charged Pagan-Lopez with possession of a controlled

[1] Upon the parties' stipulation, the preliminary hearing transcript was admitted into the evidentiary record for the motion to suppress hearing. (Tr. vol. I, p.1, L.21 – p.2, L.3.) This brief will adopt the convention of the Appellant's brief and denote the volume of transcripts containing the motion to suppress hearing, the entry of plea hearing, and trial as "Tr. vol. I." The volume containing the sentencing transcripts will be denoted as "Tr. vol. II."

substance, and with introducing and/or attempting to introduce major contraband into a correctional facility. (R., pp.31-32.)

Pagan-Lopez filed a motion to suppress, arguing the officers did not have reasonable suspicion to stop the vehicle, and that the search was too attenuated from the stop to be upheld in light of the arrest warrants. (R., pp.50-53.) The district court found there was probable cause to support the stop and denied the motion. (Tr. vol. I, p.17, L.17 – p.18, L.23.)

Prior to trial, Pagan-Lopez and the parties reached a plea agreement. (Tr. vol. I, p.24, L.9 – p.30, L.4.) But during the entry of plea hearing, the district court would not accept Pagan-Lopez's attempt to plead guilty. (Tr. vol. I, p.34, L.9, p.47, L.1.) During his colloquy Pagan-Lopez maintained that he had put the methamphetamine in his sock to protect children and simply forgot about it. (Tr. vol. I, p.34, L.9 – p.35, L.9; p.38, L.23 – p.39, L.6.) The district court was unwilling to accept this plea, and the state was not willing to offer the same plea deal via an Alford[2] plea. (Tr. vol. I, p.35, L.10 – p.41, L.16.) The case thus proceeded to trial.

Pagan-Lopez testified at trial. (Tr. vol. I, pp.204-18.) His attorney sought to ask Pagan-Lopez "about his memory problems and his epilepsy," which would have presumably bolstered his forgotten-methamphetamine-in-the-sock defense. (Tr. vol. I, p.198, L.20 – p.201, L.20; p.267, Ls.4-14.) The state objected, arguing it had not been properly notified per Idaho Code Section 18-207(4). (Tr. vol. I, p.198, L.24 – p.199,

[2] North Carolina v. Alford, 400 U.S. 25 (1970)

L.14.) The district court granted the objection and excluded "the defendant's own opinion of his medical condition" from evidence. (Tr. vol. I, p.199, L.23 – p.201, L.20.)

Pagan-Lopez was found guilty of both counts. (Tr. vol. I, p.277, Ls.6-20.) The district court sentenced Pagan-Lopez to five years imprisonment with one year fixed on the possession charge, and to two-and-a-half concurrent years with no fixed term on the introduction of major contraband charge, retaining jurisdiction. (R., pp.109-12.) The state sought $996.27 in restitution for costs of prosecution, which Pagan-Lopez objected to, but which the district court ultimately ordered. (Tr. vol. II, p.4, L.18 – p.5, L.11; R., pp.114-17.)

Pagan-Lopez timely appeals. (R., pp.118-20.)

ISSUES

Pagan-Lopez states the issues on appeal as:

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?

(Appellant's brief, p.9)

The state rephrases the issues as:

I. Has Pagan-Lopez failed to show the district court erred by rejecting his guilty plea?

II. Has Pagan-Lopez failed to show the district court erred by denying his motion to suppress evidence?

III. Has Pagan-Lopez failed to show his double jeopardy rights under the Idaho Constitution were violated?

IV. Was the exclusion of Pagan-Lopez's testimony about his mental health harmless error?

V. Has Pagan-Lopez failed to show the district court abused its discretion by ordering restitution?

ARGUMENT

I.
Pagan-Lopez Has Failed To Show The District Court Erred By Rejecting His Guilty Plea

A. Introduction

Pagan-Lopez argues the district court abused its discretion when it rejected his guilty plea prior to trial. (Appellant's brief, pp.18-28.) He contends that the district court erred because, while he "identified a potential defense of necessity," he "clearly intended to waive it." (Appellant's brief, p.25.) Pagan-Lopez also argues that the district court erred by requiring a factual basis and/or inquiring about or ruling out potential defenses, because "Mr. Pagan-Lopez's valid guilty plea was all that was required for the district court to accept it." (Appellant's brief, p.26.)

Pagan-Lopez fails to show an abuse of discretion. District courts have broad discretion to reject a plea and may do so based on all the relevant circumstances before them. Because Pagan-Lopez did not provide a factual basis that he unlawfully possessed methamphetamine the district court did not abuse its discretion by not accepting his plea.

B. Standard Of Review

Idaho's appellate court examine three factors when reviewing a claimed abuse of discretion: "(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, 226 P.3d 1269, 1274 (2010).

C. The District Court Was Well Within Its Discretion To Reject Pagan-Lopez's Plea, Given Its Doubts That There Was A Factual Basis For The Plea

"A criminal defendant does not have an absolute right under the Constitution to have his guilty plea accepted" by a trial court. North Carolina v. Alford, 400 U.S. 25, 38, n.11 (1970); see also Lynch v. Overholser, 369 U.S. 705, 719 (1962). While states may "confer such a right" Idaho has not done so; in Idaho "[a] trial judge's decision whether to accept guilty pleas" is a discretionary one, and courts are "are given wide discretion in determining whether a strong factual basis exists" for a plea of guilty. Alford, 400 U.S. at 38, n.11; Schoger, 148 Idaho at 627, 226 P.3d at 1274; State v. Jones, 129 Idaho 471, 474, 926 P.2d 1318, 1321 (Ct. App. 1996). Consequently, trial courts are well within their discretion to reject a guilty plea if the court harbors doubts about the factual basis for the plea.

That was exactly what occurred in Schoger, where, "[t]hroughout the plea colloquy, the trial court displayed persistent uncertainty as to whether a factual basis existed for Schoger's plea." Id. at 628, 226 P.3d at 1275. The court was uncertain during the colloquy because "after each question by the court pertaining to the methamphetamine found in the bedroom, Schoger looked to her attorney for answers." Id. The court "expressly told Schoger that it was asking her questions in order to establish a factual basis for a plea," and noted "it always makes me nervous when I'm talking to somebody who is looking to their attorney to see apparently what sort of answers they ought to give." Id. Moreover, the trial court noted that "I couldn't help but notice some reticence on Ms. Schoger's part when it came to the question of possession." Id. Not only that,

Ms. Schoger's "own lawyer displayed doubt as to whether there was a strong factual basis for the charge," as follows:

> [W]ith regard to the methamphetamine that was in the house, primarily Mr. Davis was the person that was handling the methamphetamine. Ms. Schoger indicates that he would basically keep it hidden from Ms. Schoger. However, that she did reside in the residence, and we strongly believe that the state is going to be able to prove constructive possession if this matter does proceed to trial.

Id. This statement from Schoger's attorney understandably "did little to alleviate the district court's tentativeness as to the factual basis for the charge." Id.

The trial court therefore "refused to accept either [Schoger's] guilty plea or an *Alford* plea." Id. at 624, 226 P.3d at 1271. The Idaho Supreme Court affirmed, finding "the conversation at the plea colloquy demonstrates that the district court held reasoned reservations about whether a factual basis existed for Schoger's guilty plea." Id. at 628, 226 P.3d at 1275. Furthermore, the trial court "recognized that *it must make the discretionary determination as to whether a factual basis existed,* and asked questions pertinent to obtaining that factual basis." Id. (emphasis added). The Schoger Court affirmed because "the district court correctly perceived the issue as one of discretion," and "[b]etween Schoger's obvious uncertainty as to the answers to the court's questions and her lawyer's declaration that a factual basis may not exist for the plea, we cannot say that the district court abused its discretion" in rejecting the guilty plea. Id. at 629, 226 P.3d at 1276.

Schoger controls here. Like Schoger, Pagan-Lopez did not provide a factual basis for his guilty plea. When the trial court asked Pagan-Lopez whether he intended to possess the methamphetamine, Pagan-Lopez testified that:

A. My intention was to throw it away, but I didn't find the right place to throw it away.

Q. So do you think that—how long did you possess it?

A. Your Honor, I put it on my socks, and I forgot about it. I don't remember how long—several hours.

Q. Do you believe you had any lawful reason to have it?

A. I did no time, 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 to throw it away later in the right place, and I forgot about it.

(Tr. vol. I, p.34, L.23 – p.35, L.9.) Based on Pagan-Lopez's statements the district court would not accept his plea:

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 to every element of the offense, so I don't think it's a provident plea.

(Tr. vol. I, p.10, Ls.10-15.) The district court went on to explain that:

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, given his statements to the court under oath.

(Tr. vol. I, p.36, L.17 – p.37, L.22.)

This was not an abuse of discretion. Like the trial court in Schoger, the district court here sought to "make the discretionary determination as to whether a factual basis existed" for a guilty plea, before accepting such a plea. See 148 Idaho at 628, 226 P.3d at 1275. And like the court in Schoger, the trial court here very reasonably doubted the existence of such a basis. Based on Pagan-Lopez's repeated assertions that he had "no reason" to possess the methamphetamine other than to protect children by throwing it away, the district court was concerned about Pagan-Lopez's defense of necessity, and how Pagan-Lopez had not provided a basis that he unlawfully possessed the drugs. (Tr. vol. I, p.36, L.17 – p.37, L.22.) The court was therefore, correctly, unwilling to "twist his arm to enter a guilty plea." (Tr. vol. I, p.37, L.18.) Per Schoger, refusing to accept a guilty plea without a sufficient factual basis was not an abuse of discretion.

On appeal, Pagan-Lopez fails to show an abuse of discretion. He contends that the district court erred because the guilty plea itself would have waived his necessity defense (Appellant's brief, pp.19-26), and that the district court applied the incorrect legal standard when it inquired into the existence of a factual basis for the plea (Appellant's brief, pp.26-27).

Both of these arguments miss the mark. As for the waiver of the necessity defense, Pagan-Lopez *himself* never stated that he wished to waive a potential defense that he had by pleading guilty. Rather, he continued to assert in his colloquy that the

defense existed. (Compare Tr. vol. I, p.34, L. 10 – p.35, L.9; p.38, L.23 – p.39, L.6 with Tr. vol. I, p.46, Ls.1-16 (where Pagan-Lopez's counsel mentions the possibility of a defense, but where Pagan-Lopez himself does not state that he wished to waive any possible defense)). Insofar as Pagan-Lopez continued to maintain the existence of a defense, the district court understandably doubted that a factual basis for a crucial element of the crime existed.

And Pagan-Lopez has not shown that, as he claims, the district court erred by not accepting his guilty plea "because a valid guilty plea does not require a factual basis." (Appellant's brief, pp.26-27.) To the contrary, the Schoger Court affirmed that district courts do not abuse their discretion by determining whether there is a factual basis before accepting a guilty plea. Schoger, 148 Idaho at 629, 226 P.3d at 1276.

Of course, the factual-basis determination can be made from information that is already in the record, and that is outside of the plea. That was exactly the case in State v. Hawkins, 117 Idaho 285, 787 P.2d 271 (1990), where the district court accepted the defendant's plea mid-trial, after hearing three weeks' of the state's evidence against him, and the defendant, also "well aware of the evidence against him" stated "that he was pleading guilty because he was tired and the state had proved its case." 117 Idaho at 285-90, 787 P.2d at 271-76. Similarly, in State v. Coffin, 104 Idaho 543, 661 P.2d 328 (1983), "the defendant's pleas of guilty to the first degree burglary charges constitute a tacit admission of the facts alleged in the informations [sic]," and where "prior to the court's acceptance of the guilty pleas, the defendant expressly admitted that he was guilty of the charges." 104 Idaho at 546, 661 P.2d at 331. Those cases both establish that there is no need for the judge to "specifically inquire" about the factual bases of every element

of the charge where "the relevant circumstances surrounding the plea as contained in the record" show the plea is knowing, intelligent, and voluntary. Hawkins, 117 Idaho at 288-90, 787 P.2d at 274-76.

However, neither of these nuanced decisions suggest an inflexible rule running the opposite direction: that a trial court *must* accept a guilty plea—despite harboring doubts about the factual basis of the crime—or risk abusing its discretion. It beggars belief that this is an appropriate standard, not just because it would dilute the trial court's "wide discretion" to reject a plea into meaninglessness. Schoger, 148 Idaho at 627, 226 P.3d at 1274. Such a standard would effectively bar trial courts from accepting guilty pleas even if they doubt there is a factual basis for the plea.

But that is not the standard. Trial courts do not abuse their discretion by not accepting a guilty plea when they doubt the factual basis of the plea. Id. at 629, 226 P.3d at 1276. Courts have wide discretion to reject a guilty plea, and the trial court here did not abuse its discretion by rejecting the plea for that reason.

Finally, while not addressed in Pagan-Lopez's briefing, the state notes that it considers this issue dispositive of all of Pagan-Lopez's claims on appeal. If this Court grants relief on this claim and remands this case for an entry of guilty plea pursuant to the parties' original plea agreement, it would obviously dispose of Pagan-Lopez's claim of trial error. It would also resolve the claimed double jeopardy violation, as the state agreed to dismiss the major contraband charge as part of the plea agreement. (Tr. vol. I, p.27, Ls.5-16.) Pagan-Lopez's Fourth Amendment claim would likewise be moot, as Pagan-Lopez agreed not to challenge the district court's ruling on the motion to suppress as part of the plea. (Tr. vol. I, p.26, L.24 – p.27, L.3.) Finally, while Pagan-Lopez agreed

to pay restitution as part of the agreement, the exact amount was left open; this issue could therefore be sorted out at a restitution hearing following the re-entry of plea and redone sentencing. (See Tr. vol. I, p.28, Ls.11-28.)

If this Court grants relief on this claim it would resolve the rest of Pagan-Lopez's claimed issues on appeal; accordingly, the state respectfully requests this Court address this potentially dispositive issue first.

II.
Pagan-Lopez Has Failed To Show The District Court Erred By Denying His Motion To Suppress Evidence

A. Introduction

Pagan-Lopez claims that the district court erred in denying his motion to dismiss because 1) the officers did not have reasonable suspicion for the traffic stop, and 2) the discovery of Pagan-Lopez's arrest warrant "did not break the causal chain between the unlawful stop and the discovery of evidence on his person at the jail." (Appellant's brief, pp.11-18.)

These arguments fail. There was ample reasonable suspicion that supported stopping Pagan-Lopez's vehicle in the course of investigating a potential residential burglary. Alternatively, even if the stop was unlawful, the discovery of the arrest warrant and circumstances surrounding the stop weigh in favor of applying the attenuation doctrine and not excluding the evidence that was ultimately found.

B. Standard Of Review

On review of a ruling on a motion to suppress, the appellate court defers to the trial court's findings of fact unless clearly erroneous, but exercises free review of the trial

court's determination as to whether constitutional standards have been satisfied in light of the facts. State v. Willoughby, 147 Idaho 482, 485-86, 211 P.3d 91, 94-95 (2009); State v. Fees, 140 Idaho 81, 84, 90 P.3d 306, 309 (2004). If findings are supported by substantial evidence in the record, those "[f]indings will not be deemed clearly erroneous." State v. Stewart, 145 Idaho 641, 648, 181 P.3d 1249, 1256 (Ct. App. 2008) (quoting State v. Jaborra, 143 Idaho 94, 98, 137 P.3d 481, 485 (Ct. App. 2006)).

C. The Officers Had Reasonable Suspicion To Stop Pagan-Lopez's Vehicle In Connection With The Investigation Of A Potential Residential Burglary

Pursuant to the Fourth Amendment of the United States Constitution "[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." U.S. Const. amend. IV. Such a detention "is permissible if it is based upon specific articulable facts which justify suspicion that the detained person is, has been, or is about to be engaged in criminal activity." State v. Sheldon, 139 Idaho 980, 983, 88 P.3d 1220, 1223 (Ct. App. 2003) (citing Terry v. Ohio, 392 U.S. 1, 21 (1968); United States v. Cortez, 449 U.S. 411, 417 (1981)).

The state has the burden of proving that the investigatory stop of a vehicle was constitutionally justified. State v. Nevarez, 147 Idaho 470, 474, 210 P.3d 578, 582 (Ct. App. 2009) (citing Florida v. Royer, 460 U.S. 491, 500 (1983)). "The reasonableness of a stop is determined by looking at the totality of the circumstances confronting the officer at the time of the stop." Nevarez, 147 Idaho at 474, 210 P.3d at 582 (citing Cortez, 449 U.S. at 417); see also State v. Rawlings, 121 Idaho 930, 932, 829 P.2d 520, 522 (1992). Likewise, "[d]ue weight must be given to the reasonable inferences that a law

enforcement officer is entitled to draw from the facts in light of his experience." Nevarez, 147 Idaho at 474, 210 P.3d at 582 (citing Terry, 392 U.S. at 27).

For example, in Nevarez, dispatch informed the responding officer "that an armed robbery had just occurred at a store in Rupert." Id. According to the report, "two Hispanic individuals wearing hooded sweatshirts, stocking caps and bandanas" committed the robbery. Id. While the officer did not have a vehicle description, or even information that the robbers were traveling by vehicle, he responded to the robbery site and encountered a suspicious vehicle:

> Here, the officer saw the car approaching from the direction of the robbed convenience store at about the time that it would have taken to drive from the robbery. The car was traveling well below the speed limit, which suggested to the officer from his experience that the driver could be attempting to avoid police contact. The occupants seemed to exhibit unusual interest in or concern about the patrol car as they went by. As Deputy Moore followed close behind the car, he saw activity suggesting that the occupants might be changing clothing or hiding items, and the driver appeared to be continuing to drive with excessive caution. The vehicle occupants, like the robbers, appeared to be Hispanic.

Id. at 474–76, 210 P.3d at 582–84.

The Nevarez Court concluded that "[t]he possibility of innocent explanations for the behavior of the driver and vehicle occupants does not preclude reasonable suspicion that they were involved in the robbery." Id. at 476, 210 P.3d at 584. The officer's observations, taken together, "were sufficient to create reasonable suspicion warranting a brief stop of the vehicle to investigate whether the occupants had committed the robbery." Id.

The Idaho Supreme Court has similarly upheld the seizure of an individual walking away from the location of a reported burglary. State v. Rawlings, 121 Idaho 930,

932–33, 829 P.2d 520, 522–23 (1992). In Rawlings, officers responded to a reported early-morning burglary of a store; upon arriving they "discovered a window had been broken in order to gain entry to the building." Id. at 931, 829 P.2d at 521. Officers noticed a "man walking across a parking lot in the block immediately to the west of the site of the reported burglary." Id. Furthermore, "[n]o other persons were visible in the area at that time." Id. The officer ran after the individual, who "continued walking northerly and disappeared along the west side of the funeral home which blocked the officer's view." Id. The officer eventually "found the individual stopped in the parking lot" and detained him. Id.

Much like the Nevarez Court, the Rawlings Court acknowledged the possibility of innocent explanations for the suspicious facts, but nevertheless found the officers had reasonable suspicion justifying the stop:

> The defendant was the only person in the area other than the police officers. The defendant was walking away from the locale of the reported burglary. The defendant departed from a walkway and proceeded to cross the parking lot, which course of travel would take him out of the vision of the police officers. There was a motel in the direction in which the defendant was traveling. It is possible that the defendant could have been on an innocent mission, but these facts, together with the reported crime, provided objectively reasonable grounds which were adequate to support a police officer's suspicion of criminal activity. These facts, in their totality, provide a basis for the trial court's conclusion that the police officer's stop of the defendant was a valid detention of a person for the purpose of investigating possible criminal activity, although there was no probable cause to make an arrest.

Id. at 933, 829 P.2d at 523.

Most recently, Idaho Court of Appeals examined a similar fact pattern in State v. Robertson, 134 Idaho 180, 183, 997 P.2d 641, 644 (2000), where officers responded to a report of a burglary alarm at a business. An officer there knew the business "had been

burglarized and vandalized on several previous occasions." Id. at 183, 997 P.2d at 644. By the time law enforcement arrived the alarm was no longer sounding, but "the officer noticed Robertson walking in a direction away from the business." Id. Robertson was "approximately 100 to 125 feet from the business in question," and was the only person in the area, so he was detained. Id. The Robertson Court similarly found the detention was justified, possible innocent explanations notwithstanding:

> In the instant case, the district court found that the officer responded at night to a reported burglar alarm, that the officer was aware that the reported building had been burglarized and vandalized in the recent past, and that Robertson was the only person at the scene of the reported alarm other than the officer. This Court will not substitute its view for that of the trier of fact as to the credibility of the witnesses, the weight to be given to the testimony, and the reasonable inferences to be drawn from the evidence. Although Robertson could have been innocently walking his dog as he claims on appeal, the facts as found by the district court provide objectively reasonable grounds to support the officer's suspicion of criminal activity. Robertson has failed to show that those findings are clearly erroneous. Consequently, we conclude that the district court's determination that the officer was justified in stopping Robertson will not be disturbed on appeal.

Id. at 185, 997 P.2d at 646 (internal citations omitted).

This case presents strikingly similar, equally suspicious facts. (Tr. vol. I, p.12, L.12 – p.18, L.23.) The trial court found that the officers "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." (Tr. vol. I, p.12, Ls.17-20.) The officers "saw a white van at the stop sign preparing to exit the street," and moreover, "[i]t was the only operating vehicle on the street." (Tr. vol. I, p.12, Ls.23-25.) The officers also "observed that there wasn't much traffic at all, and hadn't seen very many other vehicles," and so they "decided to perform a stop on the vehicle for suspicion of burglary." (Tr. vol. I,

p.12, L.25 – p.13, L.3.) The court also noted that "the officer explicitly stated in his testimony that he stopped the vehicle to investigate for suspicion of burglary." (Tr. vol. I, p.16, Ls.13-15.)

The trial court therefore correctly concluded that this investigatory stop, like those in Rawlings and Robertson, was proper. (Tr. vol. I, p.14, L.22 – p.18, L.23.) Noting the alarm, the dead-end street, the time of day and corresponding lack of traffic, and fact that the defendant was driving "the only vehicle exiting that dead-end street in the early morning hours," the trial court found the totality of the suspicious facts justified the stop:

> I do find that these facts compare to the cases in which Idaho courts have found that law-enforcement officers had a reasonable [sic] an objective reasonable standard for an investigatory stop to determine whether that van was connected in any way to the alarm and the potential burglary because under the totality of the circumstances there was sufficient evidence to support a supporting [sic] of reasonable suspicion for the reasonable stop. The investigatory stop itself was lawful.

(Tr. vol. I, p.17, L.23 – p.18, L.7.)

On appeal, Pagan-Lopez fails to show this conclusion was erroneous. He makes much ado about the volume of the burglar alarm in this case, downplaying it as "a silent alarm for a residence, not an audible security alarm for a closed business or a report of a burglary." (Appellant's brief, p.14.) Pagan-Lopez suggests that "[a] business security alarm of 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"—such as, he contends, "a household member, an animal, a fallen item, an alarm malfunction, or an unwanted intruder." (Appellant's brief, pp.12, 14.)

This argument fails. Euphemisms like "residential alarm" or a "silent alarm" are doing much of the work here by omitting the salient point: it was a burglar alarm.

(Prelim. Hr'g Tr., p.12, Ls.17-19.) The officer referred to it as a "burglary alarm." (Prelim. Hr'g Tr., p.13, Ls.5-10.) The purpose of a burglar alarm is not to alert law enforcement that a household member is sleepwalking, or that a chandelier has fallen, or that a cat is causing some mischief near the laundry-room door. A burglar alarm signifies that there is a potential burglary occurring, which is exactly why people own such alarms, and exactly why police respond to such alarms, and explicitly why the officer here was dispatched to the scene. (Prelim. Hr'g Tr., p.12, Ls.17-19; p.13, Ls.5-10.) Pagan-Lopez fails to show that this alarm—"residential" and "silent" though it may have been—was any less suspicious than a burglar alarm at a business, which he sensibly admits "weighs in favor of criminal activity." (Appellant's brief, p.14.) And any burglar alarm—residential or business—could conceivably go off for any of the reasons Pagan-Lopez conjures up; but the possibility that a burglar alarm *could* errantly activate does not mean that the facts on the ground did not support the officer's suspicions of criminal activity.

Pagan-Lopez was driving away from the location of a burglar alarm, early in the morning, on a dead-end street, and was the only vehicle present when he was stopped by the officer dispatched to investigate the alarm. The totality of these facts supports the officer's decision to stop the vehicle, and the trial court correctly concluded the same.

D. Even If The Stop Was Unlawful, The Evidence Would Be Admissible Under The Attenuation Doctrine

In the alternative, even if the stop was lawful, the evidence would be admissible under the attenuation doctrine. The state agrees with Pagan-Lopez that while the district court did not reach this issue because it found the stop was lawful (see Tr. vol. I, p.18, Ls.6-25), the parties presented argument regarding attenuation. (Appellant's brief, p.15;

Tr. vol. I, p.4, L.10 – p.12, L.11). Should this Court conclude the stop was unlawful, this issue would therefore be preserved for review on appeal. Cf. State v. Garcia-Rodriguez, 162 Idaho 271, 275, 396 P.3d 700, 704 (2017) ("This Court will not consider issues raised for the first time on appeal.").

Under the attenuation doctrine evidence may 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.'" Utah v. Strieff, 136 S. Ct. 2056, 2061 (2016) (quoting Hudson v. Michigan, 547 U.S. 586, 591 (2006)). To determine whether the attenuation doctrine applies, courts look to three factors: "the elapsed time between the misconduct and the acquisition of the evidence"; whether there were any intervening circumstances, such as an arrest warrant; and whether the police misconduct "is *purposeful* or *flagrant*." State v. Cohagan, 162 Idaho 717, 721-22, 404 P.3d 659, 663-64 (2017) (emphasis in original, citing Strieff, 136 S. Ct. 2056).

In Cohagan, while the existence of an arrest warrant weighed "strongly in favor of attenuation," the court found there was no attenuation due to purposeful or flagrant police misconduct. 162 Idaho at 721-726, 404 P.3d at 663-668. In that case there was "no 'bona fide investigation'"—the officers had "no cause" to stop the defendant, not only because they had already identified him, but "because both Officer Otto and Officer Curtis himself had already confirmed that Cohagan was not the suspected individual." Id. at 723-24, 404 P.3d at 665-66. In other words, "there was simply no reason for Officer Curtis to stop Cohagan and run a warrant check." Id. at 724, 404 P.3d at 666. Because

the attenuation doctrine does not allow "unjustified, suspicionless seizure of citizens," the attenuation doctrine was inapplicable in that case. Id. at 726, 404 P.3d 668.

Here, there was abundant suspicion and justification for the officer to stop Pagan-Lopez: Pagan-Lopez was an unidentified individual and the prime suspect in an ongoing investigation of a reported burglar alarm. He was the only person found at the area. (Tr. vol. I, p.12, Ls.22-25.) It was early in the morning, and Pagan-Lopez was driving away from the scene. (Tr. vol. I, p.12, Ls22-25.) Not only was there an ongoing bona fide investigation, but the officer had ample justification to detain Pagan-Lopez "to see if it was possibly related to that burglary alarm in any way." (Prelim. Hr'g Tr., p.12, Ls.17-19; p.13, Ls.5-10.) The officer eventually discovered that Pagan-Lopez "had an active felony warrant for his arrest." (Tr. vol. I, p.13, Ls.12-15.) Because this was nothing like an unjustified, suspicionless search, and because the active warrants were an intervening circumstance strongly favoring the state, the attenuation doctrine would apply here, and exclusion would be improper regardless of the propriety of the detention.

III.
Pagan-Lopez Has Failed To Show His Double Jeopardy Rights Under The Idaho Constitution Were Violated And Failed To Show Fundamental Error

A. Introduction

Pagan-Lopez contends, for the first time on appeal, that his double jeopardy rights under the Idaho Constitution were violated because, "[u]nder the pleading theory, the charged offense of possession of a controlled substance was a lesser included offense of introduction of major contraband." (Appellant's brief, p.29.) Pagan-Lopez failed to raise this claim below, and fails to show that it constitutes fundamental error.

B. Standard Of Review

Absent a timely objection, the appellate courts of this state will only review an alleged error under the fundamental error doctrine. State v. Perry, 150 Idaho 209, 226, 245 P.3d 961, 979 (2010).

Whether a defendant's prosecution complies with the constitutional protection against double jeopardy is a question of law subject to free review. State v. Santana, 135 Idaho 58, 63, 14 P.3d 378, 383 (Ct. App. 2000). The interpretation and application of a statute is also a question of law subject to de novo review. State v. Jones, 151 Idaho 943, 946, 265 P.3d 1155, 1158 (Ct. App. 2011).

C. Pagan-Lopez Has Failed To Show That Possession Of A Controlled Substance Is A Lesser Included Offense Of Introduction Or Attempted Introduction Of Major Contraband

Review under the fundamental error doctrine requires Pagan-Lopez to demonstrate the error he alleges: "(1) violates one or more of [his] 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." Perry, 150 Idaho at 228, 245 P.3d at 980.

Pagan-Lopez argues his unwaived constitutional right to be free from double jeopardy was violated, contending that, under the facts of this case, possession of a controlled substance "was a lesser included offense of introduction of major contraband." (Appellant's brief, pp. 28-32.) "There are two theories under which a particular offense may be determined to be a lesser included of a charged offense." State v. Sanchez-

Castro, 157 Idaho 647, 648, 339 P.3d 372, 373 (2014) (quoting State v. Curtis, 130 Idaho 522, 524, 944 P.2d 119, 121 (1997)). Those theories are referred to as the statutory theory and the pleading theory. Sanchez-Castro, 157 Idaho at 648, 339 P.3d at 373 (citations omitted). Idaho appellate courts apply the Blockburger[3] test in analyzing whether an offense is an included offense under the statutory theory. Id. (citing State v. Flegel, 151 Idaho 525, 527, 261 P.3d 519, 521 (2011)). Under this test, an offense is considered included in another offense "if all the elements required to sustain a conviction of the lesser included offense are included within the elements needed to sustain a conviction of the greater offense." Flegel, 151 Idaho at 527, 261 P.3d at 521 (quoting State v. McCormick, 100 Idaho 111, 114, 594 P.2d 149, 152 (1979)). However, on appeal, Pagan-Lopez only raises a claim under the pleading theory. (Appellant's brief, pp. 22-27.)

Idaho is among several jurisdictions which have utilized the "pleading theory" to determine whether the conviction and punishment for two offenses violates the double jeopardy clause of respective state constitutions. State v. Sepulveda, 161 Idaho 79, 87, 383 P.3d 1249, 1257 (2016); see also State v. Corbus, 151 Idaho 368, 372-375, 256 P.3d

[3] Blockburger v. United States, 284 U.S. 299 (1932).

776, 780-84 (Ct. App. 2011).[4] Under the pleading theory, a court must consider whether the terms of the charging document allege that both offenses arose from the same factual circumstance such that one offense was the means by which the other was committed. Corbus, 151 Idaho at 372-75, 256 P.3d at 780-84. Because the pleading theory relies on an examination of the charging Information, it generally provides a broader definition of greater and lesser included offenses than a statutory theory approach. Id. The pleading 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." Sanchez-Castro, 157 Idaho at 648, 339 P.3d at 373 (citing Sivak v. State, 112 Idaho 197, 211, 731 P.2d 192, 206 (1986)).

Pagan-Lopez argues that his "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." (Appellant's brief, p.31.) He contends that "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." (Appellant's 32.) Pagan-Lopez argues that because "his possession of the methamphetamine was necessary for him to introduce it into the jail," under the pleading theory, the "possession

[4] In a post-Corbus case, the Idaho Court of Appeals determined that the Idaho Supreme Court's continued application of the "pleading theory" means that the "pleading theory" is the only theory to be applied when addressing a double jeopardy claim under the Idaho Constitution. State v. Moad, 156 Idaho 654, 658 n.3, 330 P.3d 400, 404 n.3 (Ct. App. 2014); see also Sanchez-Castro, 157 Idaho at 648-649, 339 P.3d at 373-374. This appears to have been affirmed by Sepulveda, where the Idaho Supreme Court only applied the pleading theory to the appellant's double jeopardy claim under the Idaho Constitution. 161 Idaho at 87-89, 383 P.3d at 1257-59. The state is unaware of the United States Supreme Court ever applying the pleading theory.

of a controlled substance was a lesser included offense of introduction of major contraband." (Appellant's brief, p.32.)

But under Idaho's pleading theory, whether 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 88, 383 P.3d at 1258; State v. McKinney, 153 Idaho 837, 841, 291 P.3d 1036, 1040 (2013). And the face of the record does not show that, as pled, possession of a controlled substance is a lesser included offense of introduction or attempted introduction. The information, as amended, states:

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.)

From the face of the information, not all the elements of possession of a controlled substance are pled in the introduction and/or attempted introduction of major contraband charge; namely, the latter does not contain a *possession* element, while the former does. (R., p.32.) "Possession" and "introduction" are not synonyms; one can possess something without introducing (or attempting to introduce) it, and vice versa. By charging Pagan-Lopez with introducing and/or attempting to introduce major contraband under 18-2510(a)—as opposed to charging him with *possession* of major contraband,

which the state could have done under 18-2510(c)—the face of the information omitted the possession element. (See R., p.32.) Accordingly, the possession charge was not pled "as a means or element of the commission of the higher offense." See Sanchez-Castro, 157 Idaho at 648, 339 P.3d at 373.

This was exactly what occurred in Sepulveda, where the Idaho Supreme Court, applying the pleading theory, found that "[f]rom the face of the information, not all the elements of intimidating a witness are pled in the counts charging the attempted violations of the no contact order." 161 Idaho at 88, 383 P.3d at 1258. There, neither of the NCO-violation counts made "reference to whether L.M. was a witness or whether Sepulveda 'did ... or did attempt to intimidate, influence, impede, deter, obstruct, or prevent [L.M.] ... from testifying.'" Id. The Court thus concluded that "felony intimidating a witness was not pled as a means or element of the commission of either of the attempted violations of a no contact order." Id. Similarly, Count II here makes no reference to Pagan-Lopez possessing the methamphetamine; it simply charges him with introducing or attempting to introduce that methamphetamine into a correctional facility. From the face of the information, not all elements of the possession charge were pled in Count II, and so under the pleading theory there was no double jeopardy violation.

Moreover, the structure of the statute affirms that "possession" and "introduction" are separate acts, intended to be charged separately. The Idaho Legislature designed I.C. § 18-2510 so that a defendant could be charged with *either* possessing contraband in a correctional facility, or attempting to introduce contraband into a correctional facility, among other things:

> 18-2510. POSSESSION, INTRODUCTION OR REMOVAL OF CERTAIN ARTICLES INTO OR FROM CORRECTIONAL FACILITIES.
>
> (1) No person including a prisoner, except as authorized by law or with permission of the facility head, shall knowingly:
>
> (a) *Introduce, or attempt to introduce,* contraband into a correctional facility or the grounds of a correctional facility; or
>
> (b) Convey, or attempt to convey, contraband to a prisoner confined in a correctional facility; or
>
> (c) *Possess, or attempt to possess,* contraband within a correctional facility; or
>
> (d) Receive, obtain or remove, or attempt to receive, obtain or remove, contraband from a correctional facility.

I.C. § 18-2510 (emphasis added). The Legislature intended for possession and introduction to be punishable as two separate acts, and reductively reading them as synonyms here would thwart that purpose.[5]

From the face of the information, possession of a controlled substance is not the means or element by which Pagan-Lopez committed introduction and/or attempted introduction of major contraband. Because Pagan-Lopez cannot show that there was any violation of an unwaived constitutional right, he has failed to show fundamental error.

[5] The state concedes that it likely would violate double jeopardy for the state to charge possession of a controlled substance along with 18-2510(c)—i.e., along with *possession* of major contraband in a correctional facility. Depending on the charging language in that hypothetical case, the face of the information would likely contain the possession charge as a lesser included charge. But because that was not how this was charged, from the face of the information, Pagan-Lopez fails to show a double jeopardy violation.

IV.
The Exclusion of Pagan-Lopez's Testimony About His Own Mental Health Was Harmless Error

A. Introduction

Pagan-Lopez claims the district court abused its discretion when it excluded his "layperson testimony" about his mental condition. (Appellant's brief, pp.33-37.) Pagan-Lopez contends that the district court erroneously interpreted I.C. § 18-207(1) to require Pagan-Lopez to notify the state prior to presenting such evidence, and erred by excluding the evidence on that basis. (Appellant's brief, p.36.) Pagan-Lopez further claims that "the State cannot prove that this error was harmless." (Appellant's brief, p.37.)

This argument fails. While the court did err by excluding Pagan-Lopez's testimony based on I.C. 18-207(1), Pagan-Lopez ultimately went on to testify about his memory of the events at issue. The error was therefore harmless.

B. Standard Of Review

This Court "applies an abuse of discretion standard" when reviewing the trial court's evidentiary rulings. State v. Anderson, 162 Idaho 610, 615, 402 P.3d 1063, 1068 (2017) (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 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." Id. (citing Perry v. Magic Valley Reg'l Med. Ctr., 134 Idaho 46, 51, 995 P.2d 816, 821 (2000).

C. While Error, The Exclusion Of Pagan-Lopez's Testimony Regarding His Faulty Memory Was Harmless, Insofar As It Was Irrelevant To Count I, And Because Pagan-Lopez Went On To Testify About His Memory Regarding The Events In Question

Pagan-Lopez testified at trial. (Tr. vol. I, pp.204-18.) Prior to doing so, his attorney notified the court that "[o]n direct, I am going to ask my client about his memory problems and his epilepsy." (Tr. vol. I, p.198, Ls.20-23.) The state objected, claiming that pursuant to I.C. § 18-207 Pagan-Lopez had not provided sufficient notice for testimony about "a medical or physical condition or psychological condition to somehow explain away a mens rea element." (Tr. vol. I, p.198, L.20 – p.199, L.22.) The district court agreed, concluding that the notice provisions in I.C. § 18-207 applied "not only [to] expert testimony":

> THE COURT: 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.201, Ls.14-20.)

This was an error. I.C. § 18-207 provides in relevant part that:

> (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.

I.C. § 18-207(4) (emphasis added). By its plain terms, the "such evidence" that the notice provisions apply to is a reference to expert evidence on any issue of mental condition. See id.

But the error of "excluding" this evidence—evidence of purported epilepsy and "memory problems"—was harmless. As to Count I, the state did not have to prove any particular mental state to convict Pagan-Lopez of unlawful possession. See I.C. § 37-2732(c). Evidence affecting Pagan-Lopez's mental state, such as evidence of memory loss, was therefore irrelevant to Count I, and any exclusion of that evidence was harmless as to the conviction on Count I.

As to Count II, Pagan-Lopez failed to show how evidence of an epileptic condition would have any bearing on his memory or knowledge of committing the crime. (See (Tr. vol. I, p.201, Ls.5-13.) Regarding the memory problems, which could have potentially been relevant, Pagan-Lopez made this quasi-offer of proof:

> Your Honor, I would just say that I wasn't intending to have him [testify] that he isn't capable of knowingly possessing anything given his mental condition, and what I would ask him to testify about, *it would simply be to explain short-term memory loss*. Given the court's ruling, am I still allowed to inquire as to my client's opinion as to his own memory without going into the causation of how he views his own memory?

(Tr. vol. I, p.201, Ls.5-13.)

However, the record does not indicate that Pagan-Lopez was properly qualified to "explain short-term memory loss" as a matter of professional expertise. At best, Pagan-Lopez would have only been able to testify about the effects of his own memory loss on the events at issue, which is exactly what he did:

> Q. After that, were you still looking for cans when Officer Feldner made contact with you?

A. Yes.

Q. Do you remember Officer Feldner asking you to get out of the vehicle?

A. Yes.

Q. And prior to that, you never told Officer Feldner about the baggie in your sock?

A. No; at that moment, that didn't even exist to me. I forgot about it.

Q. Were you confused when he asked you to get out of the vehicle?

A. A little bit.

Q. After he explained himself, did you get out of the vehicle?

A. Yes; I did.

Q. And did he pat-search you?

A. Yeah.

Q. And did he find the needle—the syringe?

A. I think so.

Q. And did you tell him anything about the syringe?

A. I think that I told him where I found it that it was in a hygiene bag that I just found.

Q. And then you were transported to the jail by Officer Ellis; is that right?

A. Yes.

Q. You never told her?

A. At that moment that didn't exist to me.

Q. Did she ever ask you?

A. I don't know.

Q. Then you were taken to the jail in booking; do you remember that?

A. Yes.

Q. When is it that you remembered that you had the bag?

A. When I took my sock off and it was there.

Q. Had you remembered that it was there at any prior time?

A. No.

Q. What did you do when you saw the bag?

A. I almost cry.

(Tr. vol. I, p. 211, L.1 – p.212, L.16 (emphasis added).)

Pagan-Lopez was therefore able to testify, without objection, as to the only mental state relevant to the charge: he could not remember picking up the methamphetamine. (See id.) As a result, any error in excluding his opinion testimony was harmless as to Count II.

V.
Pagan-Lopez Failed To Show The District Court Abused Its Discretion In Ordering Restitution For Costs Of Prosecution

A. Introduction

Pagan-Lopez claims the district court abused its discretion when it ordered restitution for the state's costs of prosecution. (Appellant's brief, pp.37-42.) He claims the district court "abused its discretion because the State failed to show with substantial and competent evidence the costs actually incurred for prosecution." (Appellant's brief, pp.37-38.)

This argument fails. The district court correctly awarded restitution pursuant to Idaho Code § 37-2732(k), as the award was supported by sworn evidence delineating the

attorneys that worked on the case and evidence, based upon payroll records, of the actual prosecution costs to the county.

B. Standard Of Review

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, 390 P.3d 424, 426 (2017).

C. The District Court's Restitution Award Was Supported By Substantial Evidence

The state is permitted by I.C. § 37-2732(k) to "recoup its prosecution costs as restitution." Id. That statute provides that "[u]pon conviction of a felony or misdemeanor violation under this chapter or upon conviction of a felony pursuant to the "racketeering act," section 18-7804, Idaho Code, or the money laundering and illegal investment provisions of section 18-8201, Idaho Code, the court may order restitution for costs incurred by law enforcement agencies in investigating the violation." I.C. § 37-2732(k). An award of "restitution under section 37-2732(k) must be based on a preponderance of the evidence." Cunningham, 161 Idaho at 701, 390 P.3d at 427.

In Cunningham, the Idaho Supreme Court held that an "unsworn Statement of Costs does not meet" that evidentiary burden, because "unsworn representations, even by an officer of the court, do not constitute 'substantial evidence' upon which restitution under section 37-2732(k) may be based." Id. at 702, 390 P.3d at 428. The Court further clarified that the statute does "not permit recovery of what is 'reasonable,'" and only permits prosecution expenses that are actually incurred. Id. Lastly, the Court cautioned 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.

The sworn statement in support of restitution here capably meets that burden. The statement was made by Kylie Bolland, an Ada County employee with "access to payroll records maintained by Ada County in the regular course of its business." (R., p.116.) Ms. Bolland swore that the county maintained records "regarding the attorney time spent prosecuting drug cases," and that she "reviewed the time log in this case, which documents the prosecutor time spent prosecuting" this case. (R., p.116.) Ms. Bolland listed the deputy prosecutors who worked on the case, and "applied the appropriate payroll rate for said attorneys" to calculate "the aggregate actual prosecution costs" to arrive at a total of $996.27. (R., pp.116-17.)

In sum, the state presented the sworn statement of a county employee who reviewed the payroll records, including the actual time each attorney spent on the case, to calculate the actual prosecution costs to prosecute this case. This is exactly what is required by Cunningham and the plain language of Idaho Code § 37-2732(k). The district court had substantial and competent evidence to support its restitution determination.

CONCLUSION

The state respectfully requests this Court affirm Pagan-Lopez's judgment of conviction.

DATED this 15th day of May, 2018.

/s/ Kale D. Gans
KALE D. GANS
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 15th day of May, 2018, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

JENNY C. SWINFORD
DEPUTY STATE APPELLATE PUBLIC DEFENDER

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

/s/ Kale D. Gans
KALE D. GANS
Deputy Attorney General

KDG/dd