STATE OF IDAHO)
County of KOOTENAI)ss

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CLERK, DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO,

Plaintiff/Respondent,

vs.

JOSHUA NATHANIAL COTTRELL,

Defendant/Appellant.

Case No. **CR 2008 27321**

MEMORANDUM DECISION AND ORDER ON DEFENDANT'S APPEAL OF ORDER FOR RESTITUTION

Wes Sommerton, Dep. Prosecuting Attorney, lawyer for the Plaintiff/Respondent.
Craig W. Zanetti Coeur d'Alene, lawyer for Defendant/Appellant.

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I. FACTUAL AND PROCEDURAL BACKGROUND.

This is an appeal of Restitution Order entered by Magistrate Judge Stow for a claimed lack of causal nexus between elements of crime and economic loss, and arguing that restitution amount was unreasonable and inappropriate.

On December 12, 2008, Appellant Joshua Cottrell (Cottrell) was stopped by Officer Pat Sullivan (Sullivan) of the Coeur d'Alene police department and subsequently cited and arrested for possession of a controlled substance (marijuana), driving under the influence, possession of paraphernalia, destruction of evidence, and resisting and obstructing arrest. During the course of the arrest, Cottrell obstructed Sullivan and Sullivan sustained injuries. On April 20, 2009, Cottrell pled guilty to the DUI charge, the possession of a controlled

substance charge and the obstructing charge; the State dismissed the remaining counts on that date. A restitution hearing was begun on July 21, 2009, and continued to October 19, 2009. Testimonial and documentary evidence was received by Magistrate Judge Stowe and the matter was taken under advisement. Judge Stowe issued his written "Order for Restitution and Order and Judgment Amending Probation" on December 14, 2009, ordering Cottrell pay the Idaho State Insurance Fund $24,921.47 in restitution. Cottrell timely filed his Notice of Appeal on December 29, 2009, listing his issue on appeal as:

> …whether the Magistrate Court erred when it determined the issue of restitution in this matter by imposing over $20,000.00 in restitution for knee surgery for an officer who had a pre-existing knee condition. This issue encompasses violations of the State Criminal Rules as well as the constitution and statutes of the State of Idaho and federal constitutional principles.

Notice of Appeal, p. 2, ¶ 5. Cottrell's Brief of Appellant restates the issue in his Notice of Appeal, but clarifies that Cottrell was ordered to pay over $24,000 "for knee surgery for an officer who had a pre-existing knee condition in consideration of the Idaho Criminal Restitution Statute and United States and Idaho Constitutional Provisions." Brief of Appellant, p. 2. The State filed its Respondent's Brief on June 17, 2010. This matter was set for oral argument on August 4, 2010. On July 20, 2010, the parties stipulated to submit the issues on the briefing and on July 29, 2010, this Court issued its Order permitting the matter to be submitted on the briefing and vacating oral argument. The Court has reviewed the exhibits received, the transcript of the July 21, 2009, and October 19, 2009, restitution hearings, the briefs submitted on appeal and the statutes and case law cited therein.

II. STANDARD OF REVIEW.

Appeals from the magistrate's division shall be heard by the district court as an appellate proceeding unless the district court orders a trial *de novo*. Idaho Criminal Rule 54.2. No *de novo* review has been ordered in this case. Where a district court acts in an

appellate capacity on an appeal taken from the magistrate's division, and a further appeal is taken, appellate courts review the record independently of, but with due regard for, the decision of the district court. *State v. Bailey,* 117 Idaho 941, 942, 792 P.2d 966, 967 (Ct.App. 1990).

The decision to order restitution, and in what amount, is matter committed to the discretion of the trial court. *State v. Card,* 146 Idaho 111, 114, 190 P.3d 930, 933 (Ct.App. 2008). The trial court's discretion in this regard is guided by consideration of the factors listed in I.C. § 19-5304(7) and the policy favoring full compensation to victims who suffer economic loss. *Id., State v. Smith,* 144 Idaho 687, 692, 169 P.3d 275, 280 (Ct.App. 2007). Trial courts' determinations as to the appropriate amount of restitution will not be set aside on appeal if supported by substantial evidence. *State v. Taie,* 138 Idaho 878, 879, 71 P.3d 477, 478 (Ct.App. 2003).

III. ANALYSIS.

In his briefs on appeal, Cottrell makes three arguments: (1) the Court's findings were insufficient to support a specific nexus between the elements of the crime and the losses suffered; (2) the Excessive Fines Clause of the federal and Idaho Constitutions bar imposition of restitution as applied to Cottrell; and (3) the amount of restitution ordered was inappropriate and unreasonable. Brief of Appellant, pp. 3-11.

A. Nexus Between the Loss Suffered and the Elements of the Crime of Resisting and Obstructing an Officer.

Cottrell argues restitution is only permissible where there exists a nexus between the losses suffered and the elements of the crime to which a defendant has pled guilty. Brief of Appellant, p. 3, citing *State v. Shafer,* 144 Idaho 370, 161 P.3d 689 (Ct.App. 2007). In *Shafer,* the Court of Appeals held that where a defendant pled guilty to the crime of leaving the scene, restitution for losses caused by the accident were improper where the victim's

losses did not result from the criminal act to which Shafer had pled guilty. 144 Idaho 370, 373, 161 P.3d 689, 692. The Court of Appeals did, however, uphold the restitution order in *Shafer* because the defendant had consented to pay such costs as a term of the plea agreement he entered into. 144 Idaho 370, 374-75, 161 P.3d 689, 693-94. Cottrell notes he never consented to restitution as a term of his plea agreement, unlike the defendant in *Shafer.* Brief of Appellant, p. 5. Cottrell argues: "The economic loss did not causally flow from the elements of the crime and no nexus exists between the crime of Obstructing and the economic loss suffered by Officer Sullivan absent a more detailed description and directive as to the degree of causation by the Court." *Id.,* p. 6.

In response, the State quotes the Order for Restitution entered by Judge Stow, finding "the specific tear to the meniscus was caused by the twisting of his knee during the interaction with the Defendant on December 12, 2008", and notes the supporting reports and opinions of Drs. Sears and Olscamp were not rebutted by Cottrell. Respondent's Brief, p. 6-7. Cottrell replies the restitution was ordered for medical expenses "resulting from an injury sustained from an officer with a pre-existing knee injury." Reply Brief of Appellant, p. 3. Cottrell then argues: "...the order of restitution in [sic] for costs associated with a *pre-existing* knee injury should not fall within the definition of the statute as the injury is not readily ascertainable under the findings by the trial court judge." *Id.* (emphasis in original).

In *State v. Card,* 146 Idaho 111, 190 P.3d 903, the Idaho Court of Appeals noted that strict application of the rules of evidence is not required for proof of restitution claims and "[t]he statute explicitly lowers one evidentiary bar in restitution hearings by allowing the court to consider 'such hearsay as may be contained in the presentence report, victim impact statement or otherwise provided to the court.'" 146 Idaho 11, 114, 190 P.3d 930, 933.

> From the foregoing discussion it is evident that under the restitution statute, a crime must "result" in an economic loss in order for restitution to be awarded, and where treatment expenses are sought, the State bears the initial burden to make a prima facie showing, which may include evidence that would be inadmissible in a civil trial, that the expenses were reasonable and necessary to treat injuries caused by the defendant's criminal conduct.

146 Idaho 111, 114-15, 190 P.3d 930, 933-34. In *Card,* the Court of Appeals determined the victim, Beverly Shelton, was not a competent witness capable of diagnosing the cause of her physical complaints or prescribing treatment for those complaints, arising out of the DUI caused by the defendant. 146 Idaho 111, 116, 190 P.3d 930, 935. The Court did not sustain the lower courts' award of restitution for massages, colon cleansings and foot baths where Shelton did not seek any of the treatments soon after the accident,

> …[i]t cannot be said that the accident was such a readily identifiable cause of the claimed symptoms that the causal relationship is a matter within the common knowledge and experience of the average person.

146 Idaho 11, 116, 190 P.3d 930, 935. Medical or expert evidence would have been necessary to show Shelton's symptoms had been caused by Card's criminal conduct, but the State presented no evidence on such a causal link nor did the State present evidence to demonstrate the treatments Shelton south were reasonable and necessary.

In his Order, Judge Stow wrote:

> Relevant to the restitution issue, the Defendant plead guilty to Obstructing an Officer pursuant to Idaho Code 18-705. As evidenced by the Defendant's plea, Defense Exhibit A, and Defense Exhibit B, the obstructing consisted of the Defendant failing to put his hands behind his back as directed by Officer Sullivan as part of the arrest process. The Defendant attempted to pull his right arm away from Officer Sullivan and plunged his left hand into his front left pants pocket. (The Defendant had previously been directed numerous times by Officer Sullivan to keep his hands out of his pockets and he had continuously returned his hands to his pockets). As a result of the Defendant's conduct, which amounted to the criminal offense of Obstructing, Officer Sullivan attempted to gain control of the Defendant and in so doing twisted his right knee.

Order for Restitution and Order and Judgment Amending Probation, pp. 1-2, ¶ 3. Judge

Stow continued:

> This Court finds that Officer Sullivan was injured as a result of the criminal conduct of the Defendant on December 12, 2008. Officer Sullivan's reaction to attempt to control the Defendant was a reasonable and necessary reaction to, and was caused by, the criminal conduct of the Defendant. In attempting to control the Defendant Officer Sullivan twisted his right knee and suffered a tear to the lateral meniscus of his right knee. Although Officer Sullivan had some type of current preexisting injury to his right knee and had prior surgery on that knee, the specific tear to the meniscus was caused by the twisting of his knee during the interaction with the Defendant on December 12, 2008. The above findings are based on the unrebutted reports and opinions of Dr. Sears, Dr. Olscamp and Officer Sullivan, all as found in Exhibit B. The tear is the specific injury that caused the need for surgical intervention and the time loss from work as shown by the evidence presented.

Id., pp. 3-4, ¶ 9.

In *Shafer,* the Court of Appeals specifically found that the victim's losses were not the result of the defendant's criminal conduct; that is, the defendant's act of (and the crime of) *leaving the scene of the accident* did not cause or aggravate the victim's injuries. *Shafer,* 144 Idaho 370, 372, 161 P.3d 689, 690. By way of contrast, here, Judge Stow received evidence that the specific tear of Sullivan's lateral meniscus was caused by the interaction he had with Cottrell which was part and parcel of Cottrell's act of (and the crime of) *resisting and obstructing an officer*. Order for Restitution and Order and Judgment Amending Probation, p. 3, ¶ 9. Furthermore, Judge Stowe specifically discussed in his Order that the State Insurance Fund limited its payments to injuries suffered by Sullivan on December 12, 2008; "[t]he State Insurance Fund specifically denied coverage for treatment for any pre-existing condition of Officer Sullivan's knee." *Id.,* p. 4, ¶ 11. This is supported by the testimony of Mary McCoy of the State of Idaho Insurance Fund, as she testified that the injury upon which this claim for restitution is based, occurred on December 12, 2008. Tr. p. 27, Ll. 9-11. Cottrell presented no evidence to the contrary, and did not even cross examine McCoy. Tr. p. 28, Ll. 1-2. Further, unlike the facts in *Card,* the instant facts

include credible testimony and evidence on both the diagnosis Sullivan received and the prescribed treatment for such diagnosis by Dr. Sears and Dr. Olscamp, not merely the testimony of Sullivan himself.

Cottrell appears to argue the Court never made a specific finding that Cottrell's action amounted to "obstructing", and never clarified whether Cottrell's action were the direct cause, contributing cause, proximate cause, or remote cause of Sullivan's injuries. Brief of Appellant, p. 5. The holding of *Shafer* does not appear to require Judge Stow to make such a finding; and even Cottrell concedes "the State did not need to prove that Appellant was guilty of the charge because there was a plea bargain." Brief of Appellant, p. 5. Further, unlike the facts of *Shafer,* where the Court found leaving the scene of an accident is not equivalent to causing an accident in whole or in part, *Cottrell's obstruction itself* is what *caused* the injury to Sullivan. Cottrell argues the State failed to demonstrate for the Court the willful nature of his obstruction. Brief of Appellant, pp. 4-5. However, I.C. § 18-705 (Resisting and Obstructing Officers), to which Cottrell pled guilty, reads:

> Every person who *willfully* resists, delays or obstructs any public officer, in the discharge, or attempt to discharge, of any duty of his office or who knowingly gives a false report to any peace officer, when no other punishment is prescribed, is punishable by a fine not exceeding one thousand dollars ($1,000), and imprisonment in the county jail not exceeding one (1) year.

(Emphasis added). Cottrell's plea to resisting and obstructing on April 20, 2009, necessarily results in his having pled to the willful nature of his actions. "In general, while a plea of guilty is not evidence, it dispenses with evidence; thus, evidence of guilt, or of the crime, or of the essential facts or elements thereof is not required." 22 C.J.S. *Criminal Law* § 515 (2010). Cottrell's plea to a crime specifically involving a willful act as an element of the offense does away with the need to make a specific finding that his actions amounted to the elements of obstructing.

While a causal connection between a defendant's conduct and damages suffered by a victim must exist for restitution to be ordered, there is no requirement in Idaho case law that a trial court articulate the degree of causation. All that is required is that the economic loss by the victim be causally, reasonably, and rationally related to the defendant's crime. *State v. Gonzales,* 144 Idaho 775, 778, 171 P.3d 266, 269 (Ct.App. 2007); *see also State v. Parker,* 143 Idaho 165, 167, 139 P.3d 767, 769 (Ct.App. 2006) (Economic loss includes the necessary expenses or losses that a victim incurs to address the consequences of the criminal conduct by a defendant.). Even if there were the requirement under Idaho case law that the trial court articulate the degree of causation, Judge Stow essentially did that by finding that the Idaho State Insurance Fund limited its payments to injuries suffered by Sullivan on December 12, 2008; "[t]he State Insurance Fund specifically denied coverage for treatment for any pre-existing condition of Officer Sullivan's knee." Order for Restitution and Order and Judgment Amending Probation, p. 4, ¶ 11.

Cottrell's argument ignores who bears the burden here and ignores well established tort law in the State of Idaho. Restitution is mandatory. The court "…shall order a defendant found guilty of any crime which results in an economic loss to the victim to make restitution to the victim." I.C. § 19-5304(2). *State v. Bybee,* 115 Idaho 541, 768 P.2d 804 (Ct.App. 1989). The State, through the City of Coeur d'Alene attorney, on behalf of the Idaho State Insurance Fund, provided Judge Stow with extensive medical records and the testimony of McCoy. While the victim must provide evidence to establish appropriateness and reasonableness of the amount of restitution (*Id.*), which the State in the present case did, if the defendant provides no evidence to the contrary, the victim's evidence remains uncontradicted. In the present case, Cottrell provided *no* evidence. Thus, everything presented by the State is uncontradicted. Idaho Civil Jury Instruction 9.02 "Aggravation of

a pre-existing condition" (2005) reads:

> A person who has a pre-existing condition or disability is entitled to recover damages for the aggravation of such preexisting condition, if any, that is proximately caused by the occurrence. The person is not entitled to recover damages for the pre-existing condition or disability itself.
>
> If you find that before the occurrence causing the injuries in this case the plaintiff had a preexisting bodily condition or disability, and further find that because of the new occurrence in this case the pre-existing condition or disability was aggravated, then you should consider the aggravation of the condition or disability in fixing the damages in this case. You should not consider any condition or disability that existed prior to the occurrence, or any aggravation of such condition that was not caused or contributed to by reason of this occurrence.
>
> You are to apportion, if possible, between the condition or disability prior to this occurrence and the condition or disability caused by this occurrence, and assess liability accordingly. If no apportionment can reasonably be made by you, then the defendant is liable for the entire damage.

The citations given for this instruction are *Blaine v. Byers*, 91 Idaho 665, 429 P.2d 405 (1967); and *Bushong v. Kamiah Grain Growers*, 96 Idaho 659, 534 P.2d 1099 (1975). If Cottrell wished to not be liable for less than all of the Idaho State Insurance Fund's expenses incurred in Sullivan's exacerbated injuries, it was incumbent upon Cottrell to put on some evidence. Cottrell failed to do so. If Judge Stow was unable to apportion, that is Cottrell's fault in providing no evidence from which he *could* apportion. The law is clear, if apportionment cannot be made, Cottrell is responsible for all damages.

Here, the proof of Sullivan's economic loss (and therefore that of the State Insurance Fund) was provided to Judge Stow, who found the amount of economic loss by a preponderance of evidence in the form of billing statements and other records.

Judge Stow's decision to require restitution was one committed to his discretion, and this Court may not disturb his decision as to the amount of restitution ordered if it is supported by substantial evidence. *See State v. Smith,* 144 Idaho 687, 692, 169 P.3d 275, 280 (Ct.App. 2007). Judge Stow's Order was based upon the unrebutted testimony of the

medical doctors and Sullivan himself; this Court will likely find that Judge Stow's Order was based upon substantial evidence of economic loss caused by Cottrell's actions on December 12, 2008.

B. Applicability of Excessive Fines Clause.

Cottrell argues the Excessive Fines Clauses of the United States and Idaho Constitutions should apply to render the restitution ordered in this case improper. Brief of Appellant, p. 8. "The burden of payment of restitution as a condition of probation that the Appellant faces in this case bolsters the argument that it is a punitive form of monetary sanction subject to the Excessive Fines Clause." *Id.* Cottrell goes on to argue the restitution imposed is grossly disproportionate to the $1,000 maximum fine which could have been imposed for the Obstruction charge and to the gravity of the criminal offense. *Id.* And, Cottrell urges the Court to keep in mind Sullivan has already been made whole, "it shocks the conscience to believe the legislature intended the statute to be used as a diverting mechanism for insurance companies to satisfy claims and empower State prosecutors to become an agent for insurance claims collection." *Id.,* p. 9. Cottrell does note Idaho has not held the Excessive Fines Clause applicable to restitution Orders. *Id.,* p. 8. The State does not address this portion of Cottrell's argument in their briefing.

The Excessive Fines Clause limits the government's power to extract payments as punishment for an offense. *United States v. Bajakajian,* 524 U.S. 321, 328, 118 S.Ct. 2028, 2033 (1998); *Sustin v. United States,* 509 U.S. 602, 609-10, 113 S.Ct. 2801, 2805 (1993). "A civil sanction that cannot fairly be said to solely serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment." *Nez Perce County Prosecuting Attorney v. Reese,* 142 Idaho 893, 898, 136 P.3d 364, 369 (Ct.App. 2006) (citing *Austin,* 509 U.S. 602, 610, 113 S.Ct. 2801, 2805-06). In the context

of forfeiture, the constitutional inquiry is one of proportionality; that is, whether the forfeiture bears a relationship to the gravity of the offense it is designed to punish. *Bajakajian,* 524 U.S. 321, 334, 118 S.Ct. 2028, 2036.

However, I.C. § 19-5304 is intended to "obviate the need for victims to incur the cost and inconvenience of a separate civil action in order to gain compensation for their losses." *State v. Schultz,* 148 Idaho 884, 886, 231 P.3d 529, 531 (Ct. App. 2008). The public policy underlying restitution favors full compensation of victims suffering economic loss. *In re Doe,* 146 Idaho 277, 192 P.3d 1101 (Ct.App. 2008). Although Idaho has not directly addressed the issue, several other jurisdictions have held that restitution is remedial, not punitive, in nature and therefore does not affect the range of punishment a defendant faces, but is only collateral to a guilty plea. *See e.g., State v. Dugan,* 534 N.W.2d 897 (Wis.App. 1995) (Wisconsin Court of Appeals differentiated between punishment for a crime being a direct consequence and restitution being primarily rehabilitative to the defendant and compensatory to the victim); *Cruz v. State,* 742 So.2d 489 (Fla.App. 3 Dist. 1999) (holding restitution is a collateral consequence of conviction and does not increase range of punishment).

Cottrell's reliance on a Montana case is misplaced. *State v. Good,* 323 Mont. 378, 384, 100 P.3d 644, 649 (Mont. 2004), as cited by Cottrell, does hold restitution to be a fine subject to the Excessive Fines Clause, but the Montana criminal restitution statute is significantly different that the Idaho statute. While the Idaho statute requires the Court to order a defendant found guilty of a crime resulting in economic loss to order restitution "unless the court determines that an order of restitution would be inappropriate or undesirable", the Montana statute requires an offender to make full restitution to any victim suffering pecuniary loss, with no provision permitting the court to find such restitution

inappropriate or undesirable. I.C. § 19-5304; M.C.A. § 46-18-241. Additionally, M.C.A. § 46-18-241 "does not limit restitution to victims defined in terms of the offense for which the defendant was convicted or to losses arising directly from the defendant's criminal conduct." *State v. LaTray,* 302 Mont. 11, 14, 11 P.3d 116, 118 (Mont. 2000).

Cottrell's argument that the restitution order in this case be held subject to the Excessive Fines Clause finds no support under Idaho law. Because restitution is not a punishment, but rather a collateral consequence of Cottrell's actions against Sullivan on December 12, 2008, and Cottrell's subsequent plea on April 20, 2009, restitution is not subject to the Excessive Fines Clause.

C. Reasonableness of Restitution Ordered.

Cottrell asks this Court to vacate and remand the matter of restitution ordered by Judge Stow in light of: Cottrell's indigency; the hardship imposed on Cottrell by supervised probation and costs attendant thereto; the fact that denying restitution would not foreclose civil remedies; the inadequate findings by Judge Stow with regard to Cottrell's actions not amounting to obstruction and the lack of directive as to the degree of causation (discussed *supra*); and Sullivan's preexisting knee condition. Brief of Appellant, pp. 9-11. The State replies restitution in this matter was based upon substantial evidence as to the amount; i.e. medical records and final medical billing summaries. Respondent's Brief, pp. 8-9. The State also notes Cottrell's inability to pay the restitution ordered is merely one factor for the Court to consider under I.C. § 19-5304(7). *Id.,* p. 9.

Orders for restitution pursuant to I.C. § 19-5304 are separate and distinct from orders for victim compensation that may be included as a term of probation under I.C. § 19-2601. *State v. Parker,* 143 Idaho 165, 169, 139 P.3d 767, 771 (Ct.App. 2006). Judge Stow's Order was made pursuant to I.C. § 19-5304 and Cottrell's restitution was therefore

not the result of an order to compensate his victim as a term of probation. In *State v. Wakefield,* 145 Idaho 270, 178 P.3d 635 (Ct.App. 2007), the Court of Appeals considered a probationer's ability to pay an increased restitution payment schedule as a matter of first impression. The Court of Appeals reversed this Court's modification of Wakefield's payment schedule reasoning that it was error for this Court to increase Wakefield's payments prospectively without regard to his ability to pay. 145 Idaho 270, 274, 178 P.3d 635, 639.

> Without making a determination of Wakefield's ability to pay the increased amounts when those increases become effective, we conclude that, not only are those future increased payments arbitrary, but they also may be impossible or nearly impossible for Wakefield to fulfill. Certainly a condition of probation that sets a probationer up for near-certain failure can not be said to be reasonably related to the ultimate goal of rehabilitation. Therefore, the district court abused its discretion in ordering prospective increases in Wakefield's restitution payments when reinstating him on probation.

Id. However, reviewing courts' analysis as to restitution under I.C. § 19-5304 differ from that used in *Wakefield,* which involved I.C. § 19-2601. In *State v. Bybee,* 115 Idaho 541, 543, 768 P.2d 804, 806 (Ct.App. 1989), the Idaho Court of Appeals noted it would amount to an abuse of discretion for a court to order restitution as the result of an arbitrary action, rather than the logical application of the factors found in I.C. § 19-5304(7). In *Bybee,* the defendant was convicted of grand theft, sentenced to an indeterminate fourteen-year term, and ordered to pay over $1.5 million in restitution; Bybee filed a Rule 35 motion challenging the sentence and the restitution order and then appealed to the Court of Appeals. 115 Idaho 541, 542, 768 P.2d 804, 805. Bybee's argument was that several of the I.C. § 19-5304(7) factors were improperly applied, including: his financial needs and earning ability; his immediate inability to pay restitution; his age; his present assets (or lack thereof); and his serving an uncertain period of incarceration, which would prevent him from earning

money for restitution. 115 Idaho 541, 543, 768 P.2d 804, 806. The Court of Appeals held there was no abuse of discretion by the district court, noting the lower court's recognition of Bybee's immediate inability to pay and of Bybee's business acumen to earn money once he is released. "[T]he immediate inability to pay restitution would not, in and of itself, bar the court from ordering restitution. The court may order restitution in contemplation of a future ability to pay, thereby saving the victims the cost and inconvenience of a separate civil proceeding." 115 Idaho 541, 543, 768 P.2d 804, 806, citing I.C. § 19-5304(7). The Court mentioned that, had the order required Bybee to make installment payments or set a deadline for full payment of restitution, it would have been inclined to vacate the order. *Id.* As to the amount of restitution, the Court of Appeals reiterated such a determination is a question of fact and will not be disturbed on appeal where supported by substantial evidence. 115 Idaho 541, 544, 768 P.2d 804, 807.

Here, as discussed *supra,* the amount of restitution ordered by Judge Stow was supported by substantial evidence. Unlike the defendant in *Bybee,* Cottrell is not incarcerated and has the present ability to earn money.

Indeed, Cottrell's claimed impoverished status is not supported by the record. There was absolutely *no* evidence before Judge Stow as to any professed inability of Cottrell to earn money. In fact, at sentencing on July 21, 2009, the same hearing which began the evidentiary portion of the restitution hearing, Cottrell's private attorney told Judge Stow:

> [Clark Peterson] And, you know, years ago when I represented Josh those words [the importance of making proper decisions] go in one ear and out the other. That's not the Josh that's sittin' here with us anymore. *Since he got out some time back, he's had a job at the mill for two years that he's kept steadily.* And as your Honor knows, people who are doin' the things that are reflected in some of that earlier criminal history, they just can't keep a job that long. *Not only has he kept that job for a long time, but he is um, trying to get certified on additional machinery to make even more money to support his family,* and that's very important to him, Judge.

Tr. p. 13, Ll. 8-18. It is odd that two weeks after Judge Stow issued his "Order for Restitution and Order and Judgment Amending Probation" on December 14, 2009, and the day after Cottrell's private counsel filed Cottrell's Notice of Appeal on December 29, 2009, on December 30, 2009, Cottrell filed his Financial Statement for the appointment of the Public Defender, which was approved by Magistrate Judge Watson on that same date. That is the only evidence of Cottrell's impoverishment.

Cottrell did not raise the issue of his impoverishment before Judge Stow. Cottrell did not raise this issue in his Notice of Appeal filed on December 29, 2009. Cottrell filed no amended notice of appeal. In his "Brief of Appellant Joshua Cottrell", filed on May 14, 2010, Cottrell makes the claim that:

> In this case, the restitution order is inappropriate because the Appellant has been deemed indigent by the court. Appellant's original defense attorney was private counsel hired at Appellant's own expense. On Appellant's sentencing date, July 21, 2009, Judge Stow ordered the defendant to serve 150 days of jai concurrent with Appellant's other charges. TR. . 19, Lns. 24-25. Additionally, the court reserved the fact that those days "could be run consecutively to the suspended jail if there's any probation violation." Tr. p. 19 Ln. 25, p. 20 Ln 1. While granted work release, the sentence imposed caused defendant to lose his job. Subsequent to the judgment date, Appellant has been indigent due in part to the sentence imposed. Appellant seeks relief pursuant to the court granting his request for the Kootenai County Public Defender to appear in his case.

Brief of Appellant Joshua Cottrell, p. 10. There are a host of problems with this argument. First and foremost is this is an issue that was never raised before Judge Stow. Where the issue was not raised before the trial court, the appellate court would not address the issue. 119 Idaho 87, 803 P.2d 993 (1991). While the issue was attorney fees in civil litigation, Idaho Appellate Rule 35 is made applicable to this appeal pursuant to Idaho Criminal Rule 54.18. Second, on appeal, Cottrell has neither asked for a de novo review by this Court, nor has Cottrell filed any motion to augment the record nor has Cottrell filed any affidavit to

put such claims of unemployment before this Court factually. Third, by looking at the Judgment, as of December 30, 2009, Cottrell was probably not receiving a wage because he was incarcerated for the crimes at hand. However, that incarceration should have ended about a week earlier, as the 150 days noted by Cottrell's counsel in his brief, should have ended about December 21, 2009.

Finally, Cottrell argues the "constant threat of a violation of Appellant's probation for not paying restitution serves no rehabilitative purpose." Reply Brief of Appellant, p. 5. This argument, entirely unsupported by any legal authority, is simultaneously bizarre, entitling and enabling, and would spin all restitution law on its head. In this case, as in *Bybee,* there was no deadline for payment set by Judge Stow. The Order requires Cottrell to make monthly payments of $250 beginning on February 1, 2010 and continuing the first of each month thereafter, and:

> The failure to make the required restitution payments without lawful excuse would constitute a violation of probation subjecting the Defendant to the imposition of any previously suspended portions of the sentence.

Order for Restitution and Order and Judgment Amending Probation, p. 3. I.C § 19-5304(7) requires the court to consider the amount of economic loss to the victim; the financial resources, needs and earning ability of the defendant; and other factors deemed appropriate, but the immediate inability to pay cannot by itself be a reason not to order restitution. Here, the amount of economic loss to the victim was in excess of $24,000. Cottrell urges the Court to consider his indigent status, supported by the Court's granting his request for appointment of the Public Defender to appear in this appeal. Cottrell has provided this Court with no evidence of his income or lack thereof. There is simply no evidence before this Court regarding Cottrell's purported inability to pay restitution as ordered.

It is apparent that Judge Stow considered the reasonableness of the award. Judge Stow did not award the Idaho State Insurance Fund all amounts requested. Judge Stow refused to award the Idaho State Insurance Fund amounts requested for Dr. Sears evaluation ($1,554.24), and amounts requested for permanent partial impairment ($4,758.60). Order for Restitution and Order and Judgment Amending Probation, p. 4, ¶11 a and b. Judge Stow found these amounts were not sufficiently proven. *Id.* Reasonableness has been addressed by Judge Stow.

D. Reimbursement for Attorney Fees on Appeal.

Judge Watson's Financial Statement and Order which appointed the Public Defender for purposes of this appeal also reads: "THE APPLICANT IS ORDERED TO PAY REIMBURSEMENT FOR THE COST OF APPOINTED COUNSEL AT THE CONCLUSION OF THE CASE; THIS AMOUNT MAY BE IN ADDITION TO ANY SUMS ORDERED ABOVE." December 30, Financial Statement and Order, p. 2. No additional sums were ordered above. Accordingly, this Court finds Cottrell should pay the costs associated with his public defender's representation on this appeal. Cottrell's Public Defender has obviously read the transcript, familiarized himself with the exhibits and prepared two briefs. This Court finds Cottrell should reimburse Kootenai County $1,000.00 for the services of his Public Defender on his appeal.

IV. CONCLUSION AND ORDER.

For the reasons stated above, this Court affirms Order for Restitution and Order and Judgment Amending Probation entered by Magistrate Judge Stow on December 14, 2009.

IT IS HEREBY ORDERED the December 14, 2009, Order for Restitution and Order and Judgment Amending Probation is AFFIRMED in all aspects.

IT IS FURTHER ORDERED that Joshua Cottrell reimburse Kootenai County

$1,000.00 for the services of his Public Defender on his appeal.

DATED this 20th day of August, 2010

_____
JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of August, 2010 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney - Craig W. Zanetti
Prosecuting Attorney - Wes Sommerton

Hon. James Stow
Hon. Clark Peterson

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY:_____
Deputy