

**Criminal Rules Advisory Committee  
Minutes of Meeting March 6, 2019**

**Present:** Justice Richard Bevan, Chair; Judge Jessica Lorello, Judge Theresa Gardunia, Ken Jorgensen, Shawna Dunn, Erik Lehtinen, Denyce Thompson-Udink, Chuck Peterson, Vic Pearson, Sara Tompkins, and Cathy Derden.

Attended by phone: Judge Clark Peterson, Kelly Mallard, JaNiece Price.

**Rule 35.** When the criminal rules were updated in 2017, the reference to a sentence imposed in an illegal manner in subsection (b) was omitted, and this appeared to be an oversight. The Committee voted to recommend adding the reference back as follows:

Idaho Criminal Rule 35. Correcting or Reducing a Sentence

(a) **Illegal Sentences.** The court may correct a sentence that is illegal from the face of the record at any time.

(b) **Sentences Imposed in an Illegal Manner or Reduction of Sentence.** Within 120 days of the entry of the judgment imposing sentence or order releasing retained jurisdiction, a motion may be filed to correct a sentence that has been imposed in an illegal manner or reduce a sentence and the court may correct or reduce the sentence. The court may also reduce a sentence on revocation of probation or on motion made within 14 days after the filing of the order revoking probation. Motions are considered and determined by the court without additional testimony and without oral argument, unless otherwise ordered. A defendant may only file one motion seeking a reduction of sentence.

(c) **Credit for Time Served.** A motion to correct a court's computation of credit for time served, granted pursuant to Idaho Code § 18-309 or 19-2603, may be made at any time.

**Prosecuting attorney fees as restitution costs pursuant to I.C. § 37-2732(k).** I.C. § 37-2732(k) provides that upon conviction for certain offenses the court may order restitution for costs incurred by law enforcement agencies in investigating the violation. Law enforcement agencies include the office of the attorney general and county and city prosecuting attorney offices. The statute provides that costs shall include prosecution expenses actually incurred, including regular salaries of employees. There have been several cases where the prosecutor's request for fees pursuant to this statute was found not to be supported by substantial evidence, and recently the Court referred the issue to this Committee to consider making rule changes to facilitate the fair and efficient handling of restitution claims under section 2732. See State v. Cunningham, No. 45253, 2019 WL 761538, at \*5 (Idaho Feb. 21, 2019).

Based on the discussion in the *Cunningham* case, the Committee considered a proposed new Rule 37 that would come under Title VII of the Criminal Rules, "POST-CONVICTION PROCEDURES".

**Rule 37. Restitution pursuant to Idaho Code Section 37-2732(k); prosecuting attorney fees.** Pursuant to Idaho Code Section 37-2732(k) the court may order the defendant to pay restitution for costs actually incurred by law enforcement agencies in the

investigation and prosecution of certain crimes. A claim for attorney fees as costs incurred by the prosecuting attorney must be supported by an affidavit of the attorney setting forth:

- the basis and method of computation;
- the number of hours actually spent on the case;
- the hourly rate;
- a brief description of the tasks performed, and
- a certification that the statement of costs is correct.

After discussion it was agreed that:

- the first sentence should be dropped as too broad since the rule is only for prosecutors;
- the reference to the specific statute number should remain and not be a general reference to claims allowed by statute;
- that an affidavit by the attorney is necessary and that, in accord with the I.C.R. 2.1 on declarations, an affidavit includes a written certification or declaration made as provided in I.C. § 9-1406;
- that the word “claim” should be changed to “motion”, so it is clear the defense may object.

The Committee voted to recommend the following new rule with 8 in favor and 1 abstention.

Rule 37. Restitution pursuant to Idaho Code Section 37-2732(k); prosecuting attorney fees. A motion for attorney fees as costs incurred by the prosecuting attorney must be supported by an affidavit of the attorney setting forth:

- the basis and method of computation;
- the number of hours actually spent on the case;
- the hourly rate;
- a brief description of the tasks performed, and
- a certification that the statement of costs is correct.

**Calculation of Credit for Time Served.** Clarification and uniformity was requested on how to determine what constitutes a day in jail for purposes of credit for time served when a fraction of a day is involved on either end of the original booking and the release date. Some judges give credit for a day if any part of a 24 hour period is spent in jail, even if only 10 minutes, while others require a full 24 hours. This is inequitable to defendants and leaves the jail and the sheriff’s offices uncertain as to when to release a defendant.

I.C. § 18-309 “Computation of term of imprisonment” states in part: “(1) In computing the term of imprisonment, the person against whom the judgment was entered shall receive credit in the judgment for any period of incarceration prior to entry of judgment, if such incarceration was for the offense or an included offense for which the judgment was entered.”

“[T]o compute credit for days of incarceration. Idaho Code § 18–309 requires that credit be given in a judgment of conviction for “any period of incarceration” served prior to entry of judgment. This can be accomplished only by counting every day during which the defendant

served some period of confinement.” *State v. Akin*, 139 Idaho 160, 164–65, 75 P.3d 214, 218–19 (Ct. App. 2003).

The Committee agreed that it would be helpful to have a rule clarifying that, when giving credit for time served, any portion of a calendar day spent in custody must be credited as a day served. After discussion it was agreed that this language should be placed in Rule 33(b) as part of the information that should be included in a judgment. The Committee voted to recommend adding the following language to Rule 33(b):

Idaho Criminal Rule 33. Sentence and Judgment.

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(b) Judgment. The judgment of conviction must state:

- (1) the plea,
- (2) the verdict or findings,
- (3) the adjudication and sentence, and any credit for time served (for purposes of calculating credit for time served, any portion of a calendar day spent in custody counts as a day of incarceration).
- (4) the terms of probation, if any.

If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment must be entered accordingly. The judgment must be signed by the judge and entered by the clerk.

**Signed v. Filed Date.** I.R.C.P. 58 states:

Every judgment and amended judgment must be set forth on a separate document as required in Rule 54(a). The filing of a judgment by the court as provided in Rule 5(d) or the placing of the clerk's filing stamp on the judgment constitutes the entry of the judgment, and the judgment is not effective before such entry. The entry of the judgment must not be delayed for the taxing of costs.

There is no similar criminal rule that states an order or judgment is effective when filed and not signed. There is sometimes a delay between the two actions. Thus, the Committee considered whether a similar rule should be added as follows: Proposed language:

The placement of the clerk's filing stamp upon any criminal court judgment or order constitutes the entry of the judgment or order, and the judgment or order is not effective before entry. The clerk shall make every effort to file stamp and enter every criminal judgment or order immediately after the placement of a judge's signature.

The Committee discussed the fact that in criminal cases you have defendants who are sentenced or who have probation revoked and are immediately taken into custody. There are also No Contact Orders issued and served on the defendant. With Odyssey these judgment and orders should be filed the same date but that is not 100% and any time delay could cause a problem. The Committee discussed whether adding wording “unless signed by the judge and personally served on the defendant in court” would remedy any problems, but in the end decided to table this issue and attempt to find out why such a rule might be advisable, and what problems exist because there is no rule.