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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 46703-2019
Plaintiff-Respondent,)	
)	BONNER COUNTY NO. CR09-18-4532
v.)	
)	
ZANE EUGENE LUMPKIN,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	

BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF BONNER**

**HONORABLE BARBARA BUCHANAN
District Judge**

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STATEMENT OF THE CASE

Nature of the Case

After being charged with felony possession of a controlled substance, methamphetamine, and the persistent violator sentencing enhancement, Zane Lumpkin exercised his constitutional right to a jury trial. He was found guilty as charged, and received a sentence of five years, with two years fixed.

On appeal, he asserts that in its closing arguments, the prosecution committed misconduct and diminished the State's burden of proof when it argued that a jury instruction not to open an evidence bag during deliberations proved that the substance inside contained methamphetamine. Although that misconduct was not objected to, it rises to the level of fundamental error. Mr. Lumpkin respectfully requests that this Court vacate his judgment of conviction and remand his case for new trial.

Mr. Lumpkin also asserts that the district court infringed upon his constitutional right to a jury trial when it punished him for making the "strange decision" to go to trial.

Statement of the Facts and Course of Proceedings

At approximately three o'clock in the morning on October 17, 2018, Officer Zachary Fisher stopped a speeding motorist for equipment violations. (Trial Tr., p.68, L.15 – p.72, L.25; p.92, Ls.14-21.) Officer Fisher spoke to the three occupants of the car. (Trial Tr., p.74, L.2 – p.75, L.8; State's Exhibit 1.) Officer Fisher smelled marijuana so he had the driver, Zane Lumpkin, step out of the truck. (Trial Tr., p.94, Ls.19 – 25.) Mr. Lumpkin kept trying to reach into his pocket, despite being told by the officer not to reach into his pockets. (Trial Tr., p.95, L.9 – p.96, L.2; State's Exhibit 1.) Officer Fisher handcuffed Mr. Lumpkin. (Trial Tr., p.95, L.23 – p.96, L.2; State's Exhibit 1.) After he handcuffed him, Officer Fisher searched

Mr. Lumpkin. (Trial Tr., p.78, Ls.8-17; State’s Exhibit 1.) In Mr. Lumpkin’s pocket, he found a glass pipe containing white residue the officer believed could be methamphetamine. (Trial Tr., p.78, Ls.8-25; p.97, Ls.1-5; State’s Exhibit 1, 2.) Mr. Lumpkin was charged by Information with felony possession of a controlled substance and the persistent violator sentencing enhancement for prior felony convictions.¹ (R., pp.39-42.)

A one-day jury trial was held. (*See* Trial Tr.) At trial, Christina Rayner, a forensic scientist employed by the Idaho State Police Lab, testified that the residue found in the pipe in Mr. Lumpkin’s pocket contained methamphetamine. (Trial Tr., p.117, Ls.2-7; p.124, Ls.2-8.) Mr. Lumpkin testified that the pipe was borrowed from a friend and the white residue inside the pipe was not smokable—it was “blow-off” or “garbage.” (Trial Tr., p.139, L.21 – p.141, L.6.) He testified that he did not know the pipe contained methamphetamine. (Trial Tr., p.146, Ls.12-17.)

During his rebuttal closing argument, the prosecutor told the jury that the fact that the jury had been instructed in jury instruction number 18 not to open the evidence bag containing the pipe was proof that the residue inside the pipe was methamphetamine, “If it was nothing, if it’s nothing, literally, why would you have an instruction specifically telling you don’t open the bag, because it might contaminate you. There’s obviously something in there, right; and Ms. Rayner is able to test it.” (Trial Tr., p.164, Ls.1-15.) The jury found Mr. Lumpkin guilty of possessing a controlled substance and of the persistent violator sentencing enhancement. (Trial Tr., p.168, Ls.13-20; R., pp.88-90.)

¹ Mr. Lumpkin was also charged with misdemeanor possession of drug paraphernalia, but that charge was dismissed by the district court prior to trial. (R., pp.74-75.)

At Mr. Lumpkin's sentencing hearing, the State recommended a sentence of eight years, with five years fixed. (1/16/19 Tr., p.8, Ls.3-18.) Defense counsel recommended a suspended sentence with two years of probation. (1/16/19 Tr., p.10, Ls.16-23.) The district court questioned why Mr. Lumpkin did not accept the prosecutor's plea offer before trial, telling Mr. Lumpkin that he "certainly did not make this process easy," and noting that he did not appear to have any defense, but he "insisted on going to trial." (1/16/19 Tr., p.13, Ls.7-19.) It then sentenced him to five years, with two years fixed. (1/16/19 Tr., p.161, L.20 – p162, L.1.; R., p.127.) The court also imposed a public defender reimbursement fee of \$500, saying, "\$500 to Bonner County to repay some of the costs of the public defender in this case for what certainly I think was a strange decision to go to trial yesterday." (1/16/19 Tr., p.14, L.25 – p.15, L.3.) A Judgment of Conviction was entered on January 16, 2019. (R., pp.127-30.) On January 17, 2019, Mr. Lumpkin filed a Notice of Appeal. (R., pp.131-33, 142-46.)

ISSUES

- I. Did the State commit prosecutorial misconduct in closing arguments by telling the jury that the district court's instruction not to open an evidence bag proved that Mr. Lumpkin possessed methamphetamine?
- II. Did the district court impermissibly punish Mr. Lumpkin for exercising his constitutional right to trial?

ARGUMENT

I.

The State Committed Prosecutorial Misconduct In Closing Arguments By Telling The Jury That The District Court's Instructions Not To Open An Evidence Bag Proved That Mr. Lumpkin Possessed Methamphetamine

A. Introduction

Mr. Lumpkin asserts that his right to a fair trial, guaranteed by the Sixth and the Fourteenth Amendments to the United States Constitution, and Article I, § 13 of the Idaho Constitution, was violated when the prosecutor, in closing arguments, told the jury that the district court would not have instructed them not to open the evidence bag if there were not methamphetamine in there, *i.e.*, that the district court's instruction to the jury proved the State's case. Although this error is unpreserved, these constitutional violations are clear from the record and actually affected the trial's outcome. In light of the error, Mr. Lumpkin respectfully requests that this Court vacate his judgment of conviction and remand his case for a new trial.

B. Standard Of Review

A conviction will be set aside for unobjected-to prosecutorial misconduct only if the misconduct is sufficiently egregious to constitute fundamental error. *State v. Parker*, 157 Idaho 132, 141 (2014). Alleged constitutional errors not followed by a contemporaneous objection are reviewed under the fundamental error standard. *State v. Bernal*, 164 Idaho 190, 193 (2018) (citing *State v. Perry*, 150 Idaho 209, 228 (2010)). Fundamental error review includes a three-prong inquiry wherein the defendant bears the burden of persuading the appellate court that the alleged error: (1) violates one or more of the defendant's unwaived constitutional rights; (2) plainly exists (meaning the record "must contain evidence of the error and the record must also contain evidence as to whether or not trial counsel made a tactical decision in failing to object");

and (3) the appellate record must establish that the unpreserved error “actually affected the outcome of the trial proceedings.” *State v. Miller*, 165 Idaho 115, ___, 443 P.3d 129, 133-34 (2019). Mr. Lumpkin acknowledges that he did not contemporaneously object to the prosecutor’s statements and thus the statements must be evaluated as fundamental error.

C. The Prosecutor Committed Misconduct In Closing Arguments By Telling The Jury That The District Court’s Instructions To The Jury Proved That Mr. Lumpkin Possessed Methamphetamine

“[I]t [is] the duty of the Government to establish . . . guilt beyond a reasonable doubt. This notion—basic in our law and rightly one of the boasts of a free society—is a requirement and a safeguard of due process of law in the historic, procedural content of ‘due process.’” *Leland v. Oregon*, 343 U.S. 790, 802-03 (1952) (Frankfurter, J., dissenting). The Sixth Amendment, applicable to the States through the Fourteenth Amendment, ensures a criminal trial has guarantees such as the rights to notice, confrontation, and compulsory process that serve to protect of the accused from prosecutorial and judicial abuses. *Gannett Co. v. DePasquale*, 443 U.S. 368, 379 (1979). The Fourteenth Amendment states, “[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law. . . .” U.S. CONST. amend. XIV, § 1. Additionally, the Idaho Constitution also guarantees that, “[n]o person shall be . . . deprived of life, liberty or property without due process of law.” IDAHO CONST. art. I, § 13. Due process requires criminal trials to be fundamentally fair. *Schwartzmiller v. Winters*, 99 Idaho 18, 19 (1978). A defendant has a Constitutional right to have a jury pass on the question of whether an offense has been proven beyond a reasonable doubt. *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993) (“[T]he Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated.”).

Prosecutorial misconduct may so unfairly contaminate the trial as to make the resulting conviction a denial of due process. *Greer v. Miller*, 483 U.S. 756, 765 (1987); *State v. Sanchez*, 142 Idaho 309, 318 (Ct. App. 2005). In order to constitute a due process violation, the prosecutorial misconduct must be of sufficient consequence to result in the denial of the defendant's right to a fair trial. The touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor. *Smith v. Phillips*, 455 U.S. 209, 219 (1982). The aim of due process is not the punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused. *Id.*

“Prosecutors too often forget that they are a part of the machinery of the court, and that they occupy an official position, which necessarily leads jurors to give more credence to their statements, action, and conduct in the course of the trial and in the presence of the jury than they will give to counsel for the accused.” *State v. Irwin*, 9 Idaho 35, ___, 71 P. 608, 611 (1903). The prosecutor's duty is to see that the defendant has a fair trial by presenting only competent evidence and should avoid presenting evidence to prejudice the minds of the jury. *Id.* The prosecutor must refrain from deceiving the jury by use of inappropriate inferences. *Id.*

“Where a prosecutor attempts to secure a verdict on any factor other than the law as set forth in the jury instructions and the evidence admitted at trial, including reasonable inferences from that evidence, this impacts a defendant's Fourteenth Amendment right to a fair trial.” *Perry*, 150 Idaho at 227.

During his rebuttal closing remarks to the jury, the prosecutor told the jury:

Counsel also talked about the residue, how it's not a weighable amount and it's smoke. And I'll reference another jury instruction for you, number 18.² This is

² Jury Instruction No. 18 states:

interesting. So it tells you, certain items that have been admitted into evidence may contain substance residue. To preclude contamination of the evidence and to preclude such residue from coming into contact with you, the evidence has been placed in sealed plastic bags.

You are not to unseal the plastic bags when dealing with the evidence during deliberation. What do you think that means? If there's nothing in those ziplock bags, why would you have a jury instruction telling you don't open the bag because you might come in contact with it, right? So if you want to talk about, well, it's not a weighable amount, it's nothing, I think the defendant testified that it's nothing, it's garbage. It's nothing, it's blow-off.

If it was nothing, if it's nothing, literally, why would you have an instruction specifically telling you don't open the bag, because it might contaminate you. There's obviously something in there, right; and Ms. Rayner is able to test it.

(Trial Tr., p.163, L.17 - p.164, L.15.)

The prosecutor asked the jury to infer guilt from a jury instruction. The elements the State must prove in order for the jury to convict a defendant of possession of a controlled substance are well-established. *See State v. Blake*, 133 Idaho 237, 240 (1999). In order to find Mr. Lumpkin guilty of possession of methamphetamine, the jury had to find the State proved that Mr. Lumpkin possessed *methamphetamine*. (R., p.107.) By telling the jury that the court's instruction proved the pipe contained methamphetamine, the State sought to be relieved of its burden to prove an essential element of the offense (i.e., that the substance at issue was methamphetamine). (*See R.*, p.107.) The prosecutor's statement attempted to create an irrebuttable presumption through the jury instruction, thereby eliminating the State's burden to prove the identity of the substance.

Certain items that have been admitted into evidence may contain controlled substance residue. To preclude contamination of the evidence and to preclude such residue from coming into contact with you, the evidence has been placed in sealed plastic bags. You are not to unseal the plastic bags when viewing the evidence during deliberations.

(R., p.112.)

1. The Prosecutor Committed Misconduct When He Reduced The State's Burden Of Proving All Of The Material Elements Of The Offense

A defendant has a Fifth and Sixth Amendment right to have a jury pass on the question of whether an offense has been proven beyond a reasonable doubt. *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993) (“[T]he Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated.”).

By telling the jury that the district court instructed them not to open the evidence bag because the substance inside the bag really was methamphetamine, the prosecution committed misconduct. The prosecutor's closing statements reduced the State's burden of proof—essentially, the prosecution eliminated a material element of the offense when it told the jury that the district court's instruction to the jury proved the substance was methamphetamine. *See State v. Erickson*, 148 Idaho 679, 685 (Ct. App. 2010) (“Misconduct may occur by the prosecutor diminishing or distorting the State's burden to prove the defendant's guilt beyond a reasonable doubt.”).

2. The Prosecutor's Misconduct Constitutes Fundamental Error Requiring This Court To Vacate Mr. Lumpkin's Conviction

Although Mr. Lumpkin did not object to the prosecutor's improper arguments, he asserts that the prosecutor's argument amounts to fundamental error necessitating this Court to vacate his conviction. “Where prosecutorial misconduct was not objected to at trial, Idaho appellate courts may only order a reversal when the defendant demonstrates that the violation in question qualifies as fundamental error . . .” *State v. Perry*, 150 Idaho 209, 227 (2010). “Such review includes a three-prong inquiry wherein the defendant bears the burden of persuading the appellate court that the alleged error: (1) violates one or more of the defendant's unwaived constitutional rights; (2) plainly exists (without the need for any additional information not

contained in the appellate record, including information as to whether the failure to object was a tactical decision); and (3) was not harmless.” *Id.* at 228. Recently, the Idaho Supreme Court “reemphasize[d] that in order to satisfy [the second *Perry* prong] a defendant bears the burden of showing clear error in the record,” meaning the record “must contain evidence of the error and the record must also contain evidence as to whether or not trial counsel made a tactical decision in failing to object.” *State v. Miller*, 165 Idaho 115, ___, 443 P.3d 129, 133 (2019). Where the record contains no “evidence regarding whether counsel’s decision was strategic, the claim is factual in nature and thus more appropriately addressed via a petition for post-conviction relief.” *Id.* Further, whereas a defendant previously satisfied *Perry*’s third prong by “proving there is a reasonable possibility that the error affected the outcome of the trial,” *Miller* held that the appellate record must establish that the unpreserved error “*actually* affected the outcome of the trial proceedings.” *Id.* 165 Idaho at ___, 443 P.3d at 134. (emphasis added).

a. The Prosecutor’s Misconduct Violated Mr. Lumpkin’s Constitutional Rights

With respect to due process, the United States Supreme Court has explained why the prosecutor cannot lower the government’s burden of proof, holding:

Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

In re Winship, 397 U.S. 358, 364 (1970). “Where a prosecutor attempts to secure a verdict on any factor other than the law as set forth in the jury instructions and the evidence admitted during trial, including reasonable inferences that may be drawn from that evidence, this impacts a defendant’s Fourteenth Amendment right to a fair trial.” *Perry*, 150 Idaho at 227.

Here, the prosecutor eliminated one of the elements of the offense by telling the jury that the district court's instruction proved the substance was methamphetamine. It was misconduct for the prosecutor to tell the jurors that the district court's instruction to them proved the substance was methamphetamine. In telling the jury that the instruction proved the identity of the substance, the State lowered its burden to prove the charges beyond a reasonable doubt. Mr. Lumpkin asserts that his right to a fair trial by jury, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, § 13 of the Idaho Constitution, was violated by the prosecutor's reduction of the State's burden of proof during closing arguments.

b. The Error Is Clear From The Record Because The Record Shows The Failure To Object Was Not Strategic Or Tactical

This error is clear from the record. The prosecutorial misconduct in this case is plain on its face, and there is no reason to believe that Mr. Lumpkin's counsel was "sandbagging" the district court by failing to object to the prosecutor's misconduct.

The elements the State must prove in order for the jury to convict a defendant of possession of a controlled substance are well-established. *See State v. Blake*, 133 Idaho 237, 240 (1999). There is simply no strategic advantage that can possibly be gained by failing to object to, and to ask the court to correct, the prosecutor's elimination of one element of the charged crime. There is no legitimate strategic or tactical reason for defense counsel to choose not to object to such a statement. No reasonable defense attorney would want an element of the offense eliminated, because doing so serves no other purpose than to make it easier for the jury to convict the defendant. In this case, the prosecutor's improper argument allowed the jury to find Mr. Lumpkin guilty absent proof beyond a reasonable doubt that the residue in the pipe actually contained methamphetamine.

The record demonstrates that Mr. Lumpkin’s counsel *did not* make a tactical decision not to object. Although defense counsel did not make opening remarks, she elicited the defense’s theory from Mr. Lumpkin’s testimony during the defense’s case-in-chief. (Trial Tr., p.137, L.1 – p.146, L.22.) Mr. Lumpkin repeatedly testified that the substance in the pipe was not methamphetamine. (Trial Tr., p.138, L.21 – p.139, L.8; p.139, Ls.15-22; p.140, L.1 – p.141, L.6; p.143, L.13 – p.144, L.24; p.146, Ls.12-17.) Mr. Lumpkin’s defense consistently focused on his insistence that it was not methamphetamine in the pipe, but that the pipe contained simply a white film that was “garbage” byproduct. (Trial Tr., p.137, L.1 – p.146, L.22.) At the conclusion of the trial, in her closing remarks defense counsel talked again about Mr. Lumpkin’s testimony that there was no methamphetamine in the pipe. (See Trial Tr., p.161, L.1 – p.162, L.15.)

Given that the entire defense rested on the argument that there was no methamphetamine present, there was no strategic or tactical reason to allow the prosecutor to eliminate the State’s burden of proving this element. Therefore, under *Miller*, Mr. Lumpkin has met his burden to show the error plainly exists.

c. The Prosecutorial Misconduct Actually Affected The Trial’s Outcome

The State’s evidence against Mr. Lumpkin was tenuous. The amount of methamphetamine in the pipe was not a weighable amount—there was no weight to it. (Trial Tr., p.123, L.24 – p.124, L.1; p.125, Ls.15-18.) There was a white film on the inside of the pipe stem. (Trial Tr., p.96, Ls.23-25; p.114, Ls.3-10.) Thus, the pipe appeared empty—there was not a solid, burned substance visible inside the pipe. (Confidential Exh.,³ p.9 (State’s Exh. 2); Trial Tr., p.96, L.23 – p.97, L.5.)

³ The designation “Confidential Exh.” refers to the pagination of the electronic file containing all of the paper exhibits in the case.

As such, this case came down to a determination of the identity of the substance—did the jury believe the State’s witnesses, or did the jury believe Mr. Lumpkin’s testimony that the substance inside the pipe was not methamphetamine, and/or that he did not know there was methamphetamine in the pipe? As such, it is clearly improper that at closing arguments, the prosecutor eliminated one of the elements of the offense of possession of a controlled substance by telling the jury that the district court’s instruction proved the substance was methamphetamine. In light of the weak evidence in this case, and the egregious prosecutorial misconduct, Mr. Lumpkin has shown the prosecutorial misconduct actually affected the outcome of the trial. *See Miller*, 165 Idaho at ___, 443 P.3d at 134. He respectfully requests that this Court vacate his judgment of conviction and remand his case for a new trial.

II.

The District Court Impermissibly Punished Mr. Lumpkin For Taking His Case To Trial

A. Introduction

Mr. Lumpkin asserts that his rights to a jury trial, to due process, and to maintain his innocence, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, § 13 of the Idaho Constitution, were violated when the district court repeatedly disparaged his exercise of his right to a jury trial (1/16/19 Tr., p.13, Ls.7-19) and went on to impose a sentence in excess of that requested by defense counsel, as well as a “\$500 [fine] to Bonner County to repay some of the costs of the public defender in this case for what certainly I think was a strange decision to go to trial yesterday” (1/16/19 Tr., p.14, L.25 – p.15, L.3). Mr. Lumpkin asserts that the district court’s sentence and \$500 fine was punitive—imposed because he exercised his rights to maintain his innocence and to a jury trial. The district court’s sentence and fine violated his rights and requires a new sentencing hearing.

B. Standard Of Review

An appellate court exercises free review when determining whether constitutional rights have been violated in light of the facts of the individual case. *State v. Rogers*, 144 Idaho 738, 740 (2007). Sentencing decisions are evaluated for an abuse of discretion. *State v. Sheahan*, 139 Idaho 267, 284 (2003). Where a defendant contends that the sentencing court imposed an excessively harsh sentence, the appellate court will conduct an independent review of the record giving consideration to the nature of the offense, the character of the offender, and the protection of the public interest. *See State v. Reinke*, 103 Idaho 771 (Ct. App. 1982). In reviewing a trial court's decision for an abuse of discretion, the relevant inquiry regards four factors:

Whether the trial court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason.

Lunneborg v. My Fun Life, 163 Idaho 856, 863 (2018).

In this case, the district court abused its sentencing discretion by failing to act consistently with applicable legal standards and within the confines of its discretion because it imposed the sentence that did as punishment for Mr. Lumpkin's exercise of his constitutional rights.

C. The District Court Violated Mr. Lumpkin's Right To Due Process By Penalizing Him For Going To Trial

The Idaho Court of Appeals has held that a sentencing court may not penalize a defendant for exercising his right to put the government to its burden of proof at trial, or to maintain his innocence throughout sentencing and beyond so that he may also exercise his right to an appeal. *State v. Lawrence*, 112 Idaho 149, 157 (Ct. App. 1986) ("The defendant retains the right to appeal the judgment of conviction. A court should not coerce a defendant into

sacrificing the right to assert innocence by threatening a more severe sentence.”); *see also State v. Kellis*, 148 Idaho 812, 814 (Ct. App. 2010). However, a sentencing court can use the defendant’s unwillingness to acknowledge guilt in its determination of whether the defendant is capable of rehabilitation. *Lawrence*, 112 Idaho at 157; *Kellis*, 148 Idaho at 815.

A sentencing court’s decision to weigh a defendant’s claims of innocence against him has been found to constitute a due process violation. For example, in *Poteet v. Fauver*, 517 F.2d 393 (3rd Cir. 1975), the Third Circuit Court of Appeals found a due process violation where the sentencing judge implicitly told the defendant that, had he abandoned his claim of innocence, he would have received a lighter sentence. *Id.* at 396-98.

Another example can be found in *People v. Byrd*, 487 N.E. 2d 1275 (Ill. Ct. App. 1986).

In that case, the Court held that:

A more severe sentence may not be imposed because a defendant refuses to abandon his claim of innocence, or because he has exercised his constitutional right to trial. In determining whether sentencing was improperly influenced by a defendant’s failure to admit his guilt following a conviction, the court’s focus is upon whether the sentencing court indicated, either expressly or impliedly, that there would be better treatment on sentencing if the defendant abandoned his claim of innocence. Here, the court specifically referred to defendant’s continued denial of any involvement. Therefore, we must conclude that defendant’s sentence was improperly influenced by his continuing denial of guilt. Defendant’s sentence must be vacated and a new sentencing hearing must be held without consideration of his continuing denial of guilt.

Id. at 1280 (citations omitted) (emphasis added).

Thus, in the present case, the district court could have considered Mr. Lumpkin’s assertion of innocence in assessing his potential for rehabilitation, but it was not allowed to have used that assertion of innocence or his decision to go to trial as grounds to punish Mr. Lumpkin further. However, the district court told Mr. Lumpkin just before pronouncing his sentence:

Character and attitude, I don’t have a presentence report, but Mr. Lumpkin, you certainly did not make this process easy.

The Court took what I think is a very unusual step for this Court, but I brought you over to try to explain to you what you were looking at in this case; and actually, the State had made what I thought was quite a fair offer. And you, just out of hand, were not even willing to consider that.

I tried to explain that you're going to jury trial in a case where there didn't appear to be any defense, just in reading the reports, and that you were looking at the persistent violator. And you insisted on going to trial. Mr. Lumpkin, everyone has a right to go to trial.

Then we get to the end of the trial and you're – yesterday afternoon you're talking about being railroaded and how unfair everything was.

So I just wanted to remind you of the fact of the choices that you made.

(1/16/19 Tr., p.13, Ls.5-25.)

After questioning Mr. Lumpkin's decision to go to trial, the district court fashioned an underlying sentence considerably harsher than what was recommended by the defense. (*Compare* 1/16/19 Tr., p.14, Ls.8-11 (district court imposing five years, with two fixed); *with*, 1/16/19 Tr., p.10, Ls.16-22 (defense counsel recommending a suspended sentence with two years of probation).) Further, the district court charged Mr. Lumpkin "\$500 to Bonner County to repay some of the costs of the public defender in this case for what certainly I think was a strange decision to go to trial yesterday." (1/16/19 Tr., p.14, L.25 – p.15, L.3.) Mr. Lumpkin asserts that the district court's comments at sentencing and its imposition of reimbursement were not considerations about rehabilitative potential, but sought to inform Mr. Lumpkin that the district court was punishing him for exercising his due process rights. Thus, it appears that Mr. Lumpkin's sentence was improperly fashioned based on his decision to go to trial and his continuing denial of guilt.

The district court's sentence and its decision to require Mr. Lumpkin pay \$500 punished the exercise of his Sixth and Fourteenth Amendment rights to a jury trial and risks chilling other defendants' exercise of their own rights.

CONCLUSION

Mr. Lumpkin respectfully requests that this Court vacate his conviction and remand this matter for a new trial. In the alternative, Mr. Lumpkin requests that his case be remanded for resentencing by a different district court judge.

DATED this 6th day of November, 2019.

/s/ Sally J. Cooley
SALLY J. COOLEY
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of November, 2019, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served as follows:

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
E-Service: ecf@ag.idaho.gov

/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

SJC/eas