3-30-2018

State v. Medina Appellant's Brief Dckt. 45117

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent. vs. JERSSON NEFTALY ROQUE MEDINA Defendant-Appellant,	)	S.Ct. No. 45117 & 45118 Boundary Co. CR-2016-5675-FE & CR-2016-6942-FE

OPENING BRIEF OF APPELLANT

Appeal from the District Court of the Sixth Judicial District of the State of Idaho
In and For the County of Bannock

HONORABLE STEPHEN S. DUNN
Presiding Judge

Dennis Benjamin, ISB No. 4199
NEVIN, BENJAMIN, McKAY & BARTLETT
303 West Bannock
P.O. Box 2772
Boise, ID 83701
(208) 343-1000
db@nbmlaw.com

Attorneys for Appellant

Lawrence Wasden
ATTORNEY GENERAL
Paul Panther, Chief
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010
(208) 334-2400

Attorneys for Respondent

TABLE OF CONTENTS

I. TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

DOCKETED CASES

FEDERAL STATUTES

STATE STATUTES

MISCELLANEOUS

II. STATEMENT OF THE CASE

A. *Introduction*

Jerrson Roque Medina was found guilty of Trafficking in Heroin and Conspiracy to Violate the Uniform Controlled Substances Act after a jury trial. R 400. He was sentenced to concurrent terms of imprisonment of twenty years with fifteen years determinate. A $25,000 fine was imposed in each case. R 197, 412.

The Conspiracy conviction should be reversed and a judgment of acquittal entered because the state's evidence, taken as true, is constitutionally insufficient. The remaining Trafficking conviction should be reversed because court committed fundamental error in permitting Mr. Medina to be shackled before the jury. (This error applies to the conspiracy charge too, if a judgment of acquittal is not granted.)

Alternatively, the conspiracy conviction should be reversed because the court committed fundamental error by permitting the jury to return a guilty verdict based upon overt acts which were not committed by any named or unnamed conspirator and/or could not be done in furtherance of the conspiracy as a matter of law.

B. *Proceedings Below and Trial Evidence*

Mr. Medina was charged in two separate cases. Bannock Co. CR-2016-5675 charged with Trafficking in Heroin, by the knowing possession of at least 28 grams of heroin on or about April 14, 2016. R 62. The conspiracy count alleged that he, "Sharon Bernal-Valadez, and Logan Joyce, and other unnamed or unknown people . . . on or between the 2nd and 14th day of April, 2016, did willfully and knowingly

combine, conspire, confederate and agree to traffic a controlled substance, to wit: Heroin[.]" R 272. The two cases were tried together.

Logan Joyce testified that in late March to early April 2016, he was in contact with Mr. Medina about purchasing heroin. Mr. Joyce would "tell him how much money I had . . . [a]nd he would tell me how much I could get for that." T pg. 188, ln. 21-23. He described their business relationship thus: "I would give him money, and he would give me however much heroin." T pg. 188, ln. 26 – pg. 189, ln. 1.

Mr. Joyce testified that he purchased heroin from Mr. Medina and an unknown male on April 9 or 10. He described the transaction:

Q And what did you do when Jeffrey showed up?

A We got in my car and weighed it out, and I gave him money.

. . . .

Q And at the end of the negotiations and the meeting you had, what happened?

A I'm not sure if I totally follow. . . .

Q You got into the car. You gave him money. Did you exit the vehicle? What did you do?

A I – yeah. Probably shook hands and went our separate ways.

T pg. 224, ln. 8-11.

Mr. Joyce was arrested on April 12, 2016, and began to cooperate with Detective Edgely. T pg. 138, ln. 15-20. Mr. Joyce admitted buying heroin and said he would communicate with Jeffrey via text messages. T pg. 139, ln. 4-6. The detective obtained Mr. Joyce's phone and viewed the texts. Mr. Joyce told the

detective that "he was getting approximately 130 grams of heroin every two weeks, and he was paying $8,000 every two weeks for that heroin." T pg. 138, ln. 2-8. He would either go down to Salt Lake City and pick it up or Mr. Medina would deliver the drugs. Mr. Joyce would usually pay him on the spot, but there was one time where he wired $3000 to Sharon Bernal-Valadez to complete an $8000 purchase. T pg. 138, ln. 9-16.

On April 13, 2016, the detective texted the number found on Mr. Joyce's telephone. T pg. 145, ln. 18-19. The detective made arrangements for that person to buy 130 grams of heroin the next day for $8000. T pg. 145, ln. 18-25. Mr. Joyce was not involved in setting up this transaction. T pg. 198, ln. 12-18.

On April 14, 2016, Mr. Medina and Sharon Bernal-Valadez arrived at Mr. Joyce's apartment complex. They were arrested. Mr. Medina did not have any drugs on his person, but the telephone in his possession rang when the detective dialed the number he had been texting. T pg. 152, ln. 16-24. Ms. Bernal-Valadez was searched and 126 grams (gross weight) of heroin was found. T pg. 168, ln. 10-22. When told that the drugs had been found, Mr. Medina said that it did not belong to him or her, but he could show the police where it came from. T pg. 260, ln. 24-25.

Ms. Bernal-Valadez and Mr. Medina were placed in a patrol vehicle and surreptitiously recorded. Mr. Medina made statements indicating that he was aware of the presence of the drugs. T pg. 270, ln. 23 – pg. 271, ln. 5; Exhibit 4A.

III. ISSUES PRESENTED ON APPEAL

1. Must the conspiracy conviction be reversed due to the absence of proof that Mr. Medina entered into an agreement with either of the named co-conspirators?

2. Was it fundamental error to permit Mr. Medina to appear before the jury shackled and in jail clothing?

3. Was it fundamental error for the court to instruct the jury that it could return a verdict of guilty if it found an overt act which was not committed by a charged member of the conspiracy and/or was not in furtherance of the conspiracy?

IV. ARGUMENT

A. *The State's Evidence was Constitutionally Insufficient to Establish all the Elements of Conspiracy to Traffic in Heroin Beyond a Reasonable Doubt.*

1. Introduction.

The Information alleged that on or between the 2nd and 14th days of April, 2016, Mr. Medina entered into an agreement with Logan Joyce and Sharon Bernal-Valadez to traffic in a controlled substance, the state's evidence showed that Mr. Medina and Mr. Joyce had a buyer-seller relationship, not an agreement to traffic. Further, Ms. Bernal-Valadez, when called by the state to testify against Mr. Medina, said that she was forced to assist him in the sales to Mr. Joyce and never agreed with Mr. Medina to participate in the sale on April 14. As neither of the co-conspirators had an agreement with Mr. Medina or each other, the state's evidence was constitutionally insufficient.

2. Standard of review.

A finding of guilt will be overturned on appeal where there is not substantial evidence upon which a reasonable trier of fact could have found that the prosecution sustained its burden of proving the essential elements of a crime beyond a reasonable doubt. The Court considers the evidence in the light most favorable to the prosecution. *State v. Morales*, 146 Idaho 264, 266, 192 P.3d 1088, 1090 (Ct. App. 2008). Idaho's substantial evidence rule is similar, but not identical, to the federal rule, mandated by the Fourteenth Amendment's due process clause, which requires the reviewing court to determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also In re Winship*, 397 U.S. 358 (1970).

3. Conspiracy requires an agreement.

There is a difference between a conspiracy to commit a crime and the crime itself. *United States v. Loveland,* 825 F.3d 555, 557 (9th Cir. 2016). Conspiracy, by its nature, requires proof beyond a reasonable doubt that at least two persons had an agreement to commit the underlying offense. *United States v. Lennick*, 18 F.3d 814, 818 (9th Cir. 1994), *citing United States v. Hart*, 963 F.2d 1278, 1283 (9th Cir. 1992); *United States v. Becker*, 720 F.2d 1033, 1035 (9th Cir. 1983). The prosecution must show (1) an agreement to accomplish an illegal objective; (2) the commission of an overt act in furtherance of the conspiracy; and (3) the requisite intent necessary to commit the underlying offense. *Id., citing United States v. Melchor-Lopez*, 627

F.2d 886, 891 (9th Cir. 1980). Here, there was no agreement to commit trafficking in heroin with either of the named co-conspirators or with law enforcement. Consequently, the conspiracy conviction must be reversed and a judgment of acquittal entered.

4. There was no agreement with Logan Joyce to traffic in heroin.

A relationship where one person offers to sell controlled substances and another agrees to buy them, without more, is not sufficient evidence of a conspiracy. It is evidence of a delivery of a controlled substance on the seller's side and of possession of a controlled substance on the buyer's side. "Conspiracy means an agreement to commit a crime, not commission of the crime." *United States v. Loveland*, 825 F.3d at 557. The difference is illustrated by *Loveland*. There, three "coconspirators testified to repeated sales to Loveland of two ounces at a time, each time for $2,400. And each time, Loveland paid cash on delivery . . . For Loveland . . . it was cash on the barrelhead every time—no discounts, no credit, and no agreement about what he would do with the drugs. Loveland would call when he wanted a delivery, and the conspirators would deliver the usual two one-ounce bags to his house and collect the usual $2,400." *Id.* at 558. This evidence was found to be insufficient because proof that a defendant sold drugs to another person does not prove the existence of a conspiracy. *Loveland*, *supra; see also United States v. Lechuga*, 994 F.2d 346, 347-50 (7th Cir.) (en banc), *cert. denied*, 114 S.Ct. 482 (1993); *United States v. Horn*, 946 F.2d 738, 740-41 (10th Cir. 1991). "Rather, conspiracy requires proof of 'an agreement to commit a crime other than the crime

that consists of the sale itself.' Were the rule otherwise, every narcotics sale would constitute a conspiracy." *United States v. Lennick*, 18 F.3d 814, 819 (9th Cir. 1994), *quoting Lechuga*, 994 F.2d at 347 (internal citation omitted). The *Loveland* Court concluded that 'regular' purchases on 'standard' terms do not transform a customer into a co-conspirator. 825 F.3d at 562-563, *citing United States v. Colon*, 549 F.3d 565, 567 (7th Cir. 2008).

Here, there was evidence of one sale between Mr. Medina and Mr. Joyce, during the April 2 – April 14 time period alleged in the Information, that taking place on April 8 or 9, where $8000 was exchanged for 130 grams of heroin.[1] That is evidence that Mr. Medina is guilty of a delivery of a controlled substance but is not evidence of a conspiracy. *Loveland*, *supra*. So, unless there is evidence that Mr. Medina entered into an agreement with someone else there is not sufficient evidence to prove the conspiracy. And, as will be shown below, there is no such evidence.

5. <u>There was no agreement with Sharon Bernal-Valadez to traffic in heroin.</u>

Ms. Bernal-Valadez pleaded guilty to the trafficking charge. T pg. 243, ln. 22-23. She received a five-year sentence with three fixed. *State v. Valadez*, No. 44790, 2017 Ida. App. Unpub. LEXIS 270, at *1 (Ct. App. 2017). When Ms. Bernal-Valadez testified on behalf of the state, she expressly denied the existence of an

[1] The other deliveries took place prior to April 2, but those were of the same nature, a sale of 130 grams for $8000. T pg. 138, ln. 2-8. As Mr. Joyce explained, "I would give him money, and he would give me however much heroin." T pg. 188, ln. 26 – pg. 189, ln. 1.

agreement between herself and Mr. Medina. She testified about her abusive relationship with Mr. Medina, saying that she had to quit her job because she didn't want to show up for work after he hit her. T pg. 230, ln. 2-6. On April 14, Mr. Medina told her to put on a certain pair of pants and then "put the packet [of drugs] in my pants." She didn't want to put on the pants or hide the drugs but he gave her a look like he was going to hit her so she complied: "I already knew his look when he didn't like what I was saying.[2] So I went and put on the pants and put the drugs inside." T pg. 230, ln. 21 – pg. 231, ln. 3. He also forced her to drive the vehicle once they arrived in Idaho. T pg. 231, ln. 4-9. "And I got upset. We got into an argument. And then with his look, I already knew." T pg. 233, ln. 22-25. She later said that, "he would make me think what he wanted when he would hit me. That's what would happen." T pg. 235, ln. 25 – pg. 236, ln. 2.

Ms. Bernal-Valadez said that the money Mr. Joyce wired to her was done without her prior knowledge or permission. T pg. 236, ln. 17-18 ("He would just tell me, 'Okay, the guero, the white guy, he put money already in your account,' and he would give him my name.") When they retrieved the money, Mr. Medina took it. T pg. 240, ln. 20-23. ("And if you guys investigate and see the video there at the Wal - Mart on South 54th in Salt Lake City, you will see that he grabs the money. It was his."); pg. 242, ln. 3-7 ("Jersson would keep the money, and he would send it to his family. If you guys look it up, under Jersson Naftaly Medina, he would send money

[2] She identified Mr. Medina at trial by saying "He's right in front of me, right here. And he has a brown uniform on, and he's looking at me angry." T pg. 230, ln. 11-13.

back to his parents; his mom, his dad, his brothers. I wouldn't keep any of it. He would take all the money."). She did not send any of the text messages to Mr. Joyce. T pg. 243, ln. 1-4. She did not have any control of that telephone at all. T pg. 240, ln. 5-7. ("That was completely his. It was completely his. It was just under my name because of the company that he got it with, you had to have an ID.").

When the prosecutor asked, "Why did you put the package down your pants?" she answered: "Well, I put -- I put it because he told me to. And I had to do what he told me. If not, he would get upset with me, and he would tell me mean things, and then he would mistreat me." T pg. 242, ln. 22-25. And when defense counsel asked, "Did you conspire with Mr. Medina to bring drugs from Utah to Idaho? She said:

A What's "conspire"?

Q Agree to bring drugs to Idaho?

A I was not in agreement with him. He just told me to do it, so I did it.

T pg. 245, ln 3-6.

In light of the above, the state failed to present sufficient evidence to prove there was an agreement between Mr. Medina and Ms. Bernal-Valadez. So, unless there is evidence that Mr. Medina entered into an agreement with an unnamed conspirator, there is not sufficient evidence to prove the conspiracy. As will be shown below, there is no such evidence.

6. <u>There was no agreement with Detective Edgley to traffic in heroin.</u>

The only other person Mr. Medina could have been found to have agreed with is Detective Edgley. But that is not possible as a matter of law because it is "well-

established that one who acts as a government agent and enters into a purported conspiracy in the secret role of an informer cannot be a co-conspirator." *United States v. Chase*, 372 F.2d 453, 459 (4th Cir.), *cert denied*, 387 U.S. 907 (1967), *citing Sears v. United States*, 343 F.2d 139, 142 (5th Cir. 1965) ("as it takes two to conspire, there can be no indictable conspiracy with a government informer who secretly intends to frustrate the conspiracy") *citing United States v. Wray*, 8 F.2d 429 (N.D. Ga. 1925)). "Unless at least two people commit [the act of agreeing], no one does. When one of two persons merely pretends to agree, the other party, whatever he may believe, is in fact not conspiring with anyone." *United States v. Rosenblatt*, 554 F.2d 36, 38 (2d Cir. 1977), *quoting* Developments in the Law - Criminal Conspiracy,72 Harv.L.Rev. 920, 926 (1959); *Accord: United States v. Escobar de Bright*, 742 F.2d 1196, 1198 (9th Cir. 1984) (adopting *Sears* rule); *see also United States v. Barnes*, 604 F.2d 121, 161 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980) ("The Government showed that [the defendant's] involvement was more far-ranging than simply having conspired with Government agents, for which no conspiratorial liability could be imposed.").

In sum, since neither Mr. Joyce nor Ms. Bernal-Valadez entered into a conspiratorial agreement with Mr. Medina, and because Detective Edgley could not have done so because his intent was to thwart the enterprise, the state failed to present sufficient evidence to prove the agreement element of the conspiracy charge beyond a reasonable doubt. Therefore, the conviction is in violation of the due process clause of the Fourteenth Amendment under *State v. Morales*, *supra*,

Jackson v. Virginia, *supra*, and *In re Winship*, *supra.* It should be vacated and a judgment of acquittal entered.

7. Alternatively, a new trial is required because this Court cannot determine whether the jury based its finding of a conspiracy based upon an agreement with Joyce or Bernal-Valadez.

In the event the Court finds that the evidence was sufficient as to only one named co-conspirator, it should reverse the conviction and remand for a new trial. If, for example, the Court finds there was sufficient evidence to show Mr. Medina had an agreement with Ms. Bernal-Valadez, it is still possible the jurors did not unanimously find that agreement existed. Or, the jury could have unanimously found there was only an agreement between Mr. Medina and Mr. Joyce. In either case, the verdict would not be supported by constitutionally sufficient evidence, as required by the due process clause. *Jackson v. Virginia*, *supra*; *In re Winship*, *supra*. It would not be possible for this Court to determine beyond a reasonable doubt that the jury unanimously found the same agreement it found sufficient. Consequently, the state could not meet its burden of proving the constitutional error harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18 (1967); *State v. Perry*, *supra*.

B. *It was Fundamental Error to Permit Mr. Medina to Appear Before the Jury Shackled.*

1. Facts pertinent to issue

During the trial, Mr. Medina was in jail garb and shackled. T pg. 257, ln. 25 – pg. 258, ln. 2 (Testimony of Detective Paul Olsen: "He's seated at the table directly

in front of me in a brown jumper with orange shoes"); T pg. 301, ln. 12-13 (Sgt. Todd Orr: "He has a jumpsuit with the orange shoes, black hair."); T pg. 165, ln. 23-25 (Det. Lee Edgley: "Hispanic male with black hair. He's wearing . . . [a] jumpsuit with orange shoes, and that's who we identified as Jersson Roque Medina."). Mr. Joyce testified:

MS. PRICE: And for the record, could you describe what he looks like and what he's wearing, please?

JOYCE: He's wearing a white long sleeve shirt, orange Crocs, chains, and a tan jumpsuit.

MS. PRICE: Your Honor, I would ask that the record reflect that Mr. Joyce has identified the defendant.

THE COURT: So reflected.

T pg. 193, ln. 4-11.

There was no objection to the shackling.

2. <u>It was fundamental error for the court to keep Mr. Medina shackled in front of the jury.</u>

This Court has held that in order to establish fundamental error the defendant must prove that the alleged error: (a) violates one or more of the defendant's unwaived constitutional rights; (b) 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 (in most instances) (c) was not harmless. *State v. Perry*, 150 Idaho 209, 228, 245 P.3d 961, 980 (2010). All three requirements are present here.

(a) *Keeping Mr. Medina in shackles violated his unwaived constitutional right to be free from unwarranted restraints.*

The Fifth Amendment states that no person shall be "deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. And, "[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982) (alteration in original), *quoting Greenholtz v. Neb. Penal Inmates*, 442 U.S. 1, 18 (1979) (Powell, J., concurring in part and dissenting in part). This liberty interest includes the right to be free from shackles in the courtroom. *See Deck v. Missouri*, 544 U.S. 622, 629-30 (2005). "Before a presumptively innocent defendant may be shackled, the court must make an individualized decision that a compelling government purpose would be served and that shackles are the least restrictive means for maintaining security and order in the courtroom." *United States v. Sanchez-Gomez*, 859 F.3d 649, 660-61 (9th Cir. 2017), *cert. granted on other grounds*, 138 S.Ct. 543 (2017).

The Supreme Court held in *Deck* that "the Constitution forbids the use of visible shackles during the penalty phase, as it forbids their use during the guilt phase, unless that use is 'justified by an essential state interest'—such as the interest in courtroom security—specific to the defendant on trial." *Deck*, 544 U.S. at 624, *quoting Holbrook v. Flynn*, 475 U.S. 560, 568-69 (1986). There are three constitutional bases for this right: (1) the Fifth Amendment presumption that a defendant is innocent until proven guilty; (2) the Sixth Amendment right to counsel

and participation in one's own defense; and (3) the dignity and decorum of the judicial process, which includes "the respectful treatment of defendants." *Id*. at 630-31l; *accord Williams v. Woodford*, 384 F.3d 567, 591 (9th Cir. 2004) (criminal defendants have a "constitutional right to be free of shackles and handcuffs in the presence of the jury absent an essential state interest that justifies the physical restraints.") (citations omitted). There is nothing in the record showing that the court made a finding that an essential state interest justified the use of restraints during trial.

Further, this right was not waived by Mr. Medina. "[T]he state has a heavy burden in overcoming a presumption against the waiver of constitutional rights." *State v. Bainbridge*, 108 Idaho 273, 276 (1985) (citation omitted). On appeal, a waiver of a constitutional right "will be upheld if the entire record demonstrates the waiver was made voluntarily, knowingly and intelligently." *State v. Weber*, 140 Idaho 89, 95 (2004); *see also State v. Mitchell*, 104 Idaho 493, 498 (1983) (appellate court looks to the totality of the circumstances when assessing whether trial court properly found a valid waiver of a constitutional right). There is no indication in the record that Mr. Medina was aware of his right to be free from unwarranted restraints or that he waived that right. Thus, the first prong of the *Perry* test has been met.

(b) *The error plainly exists and the failure to object was not tactical.*

It is plain from the record that Mr. Medina was in shackles and jail garb. Further, there could be no tactical reason to fail to object to Mr. Medina being

shackled (or in jail garb for that matter). The use of chains conveyed to the jury that Mr. Medina was both guilty of the charges and a dangerous person.

Dangerousness was an unspoken issue in this case because Mr. Medina was largely convicted on the basis of informant testimony. The jury could have concluded that Mr. Medina was a threat to the state's informants and required chaining. And, as detailed above, Ms. Bernal-Valadez accused Mr. Medina of forcing her through threats and intimidation in participating in drug sales and of giving her an angry look while she was testifying. T pg. 203, ln. 11-13.

No possible defense tactical or strategic purpose could be served by allowing Mr. Medina to be chained and the absence of such purposes can be presumed. *See McKay v. State*, 148 Idaho 567, 571, 225 P.3d 700, 704 (2010) (finding deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1984), where there was "no conceivable tactical justification for trial counsel's failure to object").

(c) *The error is presumptively prejudicial and affected the fairness, integrity and public reputation of the trial.*

At trial, the sight of a defendant in shackles could prejudice the jury against him or her. And as prejudice is difficult to discern from a cold record, shackles visible to the jury are considered "inherently prejudicial." *Deck v. Missouri*, 544 U.S. at 635, *quoting Holbrook v. Flynn*, 475 U.S. at 568; *see also Spain v. Rushen*, 883 F.2d 712, 721 (9th Cir. 1989). Such presumptively prejudicial error meets the third

prong of the *Perry* test.[3] The *Perry* Court noted, "there may be other constitutional violations that would so affect the core of the trial process that they would require an automatic reversal[.]" 150 Idaho at 222-23. However, it would be inconsistent with the fundamental error doctrine as articulated in *Perry* to hold that appellate relief is not available in light of *Deck*'s statement that such error is "inherently prejudicial." 475 U.S., at 568. That statement is "rooted in our belief that the practice will often have negative effects, but effects 'cannot be shown from a trial transcript.'" 544 U.S. at 635, *quoting Riggins*, *supra*, at 137. "Thus, where a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation." *Id*. The concerns about proving prejudice in shackle cases are the same which caused the Supreme Court to deem similar errors as structural. Structural defects are said to defy analysis by harmless-error standards because they affect the framework within which the trial proceeds, and are not simply an error in the trial process itself. *United States. v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006). Likewise here, seeing Mr. Medina shackled affected the entire trial

[3] The question of whether structural error is *per se* prejudicial under *Perry* is currently pending before this Court in *State v. Vasquez*, No. 45346. Several Circuit Courts have held that no prejudice need be shown for even unobjected-to structural error. *See e.g., United States v. Wiles*, 102 F.3d 1043, 1060-61 (10th Cir. 1996) (structural error falls within the "special category of forfeited errors" that does not require a showing of prejudice, but rather, must be corrected under plain error review and F.R.Cr.P. 52. *See also United States v. Vazquez*, 271 F.3d 93, 100 (3rd Cir. 2001); *United States v. David*, 83 F.3d 638, 646-47 (4th Cir. 1996); *United States v. Jimenez Recio*, 371 F.3d 1093, 1101 (9th Cir. 2004).

proceeding but the Court is unable to "assess how those mistakes affected the outcome." *Gonzalez-Lopez*, 548 U.S. at 150-51.

Moreover, having Mr. Medina in shackles without justification adversely affected the fairness, integrity and public reputation of the trial by undermining his Fifth Amendment presumption of innocence, his Sixth Amendment right to effect counsel and to participate in his defense; and "the dignity and decorum of the judicial process." *Deck*, 544 U.S. at 630-311.

3. Conclusion

It was fundamental error for the court to allow Mr. Medina to appear before the jury shackled absent an essential state interest that justifies the physical restraints. This Court should reverse the convictions and remand for a new trial.

C. *The District Court Committed Fundamental Error When it Gave Jury Instruction No. 17.*

Alternatively, the Conspiracy conviction should be vacated and the matter remanded for a new trial due to fundamental instructional error. The Information alleged several "overt acts" which were not done by an alleged co-conspirator and/or could not have been taken in furtherance of the conspiracy. R 273. In turn, the court's Jury Instruction 17 set forth the same "overt acts" alleged in the Information. R 383-84. In doing so, the district court committed fundamental error.

1. Facts pertinent to issue.

The court's elements instruction on the conspiracy count instructed the jury that it must find "the defendant, Jersson Neftaly Roque Medina, and Sharon Bernal-Valadez and Logan Joyce and other unknown persons agreed to commit the crime of trafficking a controlled substance, heroin" and that "one of the parties to the agreement performed at least one of the following acts:"

> 1. On or about April 12, 2016, a search warrant was executed at apartment at 4170 Hawthorne in Chubbuck, Idaho belonging to JOYCE. During the search law enforcement seized approximately 157 grams of Heroin, JOYCE's cell phone and numerous other items.
>
> 2. JOYCE provided detectives with information, including the phone number (716-773-9155) of the person ("Jeffrey") from whom JOYCE had previously purchased Heroin.
>
> 3. JOYCE's phone contained a text message from JOYCE to SHARON BERNAL indicating JOYCE had wired $3,000 to BERNAL on or about April 2, 2016.
>
> 4. On or about April 13-14, 2016, detectives used JOYCE's phone to contact the above phone number and arranged to purchase 130 grams of Heroin for $8,000 from "Jeffrey."
>
> 5. On or about April 14, 2016, BERNAL drove a vehicle to 4170 Hawthorne in Chubbuck, Idaho and parked.
>
> 6. MEDINA, aka "Jeffrey," was a passenger in the vehicle.
>
> 7. MEDINA's cell phone was removed from his hands; a detective called the above number and the phone seized from MEDINA rang with the detective's phone number visible on the screen.
>
> 8. MEDINA told detectives he was there to collect $1,000 from JOYCE and that he and BERNAL bring Heroin to Pocatello from Utah.
>
> 9. BERNAL was searched and approximately 127 grams of Heroin were discovered on her person.

R 383-384. The jury instruction listed verbatim the overt acts alleged in the Information. Compare R 273. There was no defense objection to the instruction. T pg. 326, ln. 6-17.

2. Standard of review.

The correctness of jury instructions is a question of law over which this Court reviews *de novo*. "The standard of review for issues concerning jury instructions is limited to a determination of whether the instructions, as a whole, fairly and adequately present the issues and state the law." *Bailey v. Sanford*, 139 Idaho 744, 750, 86 P.3d 458, 464 (2004), *quoting Lubcke v. Boise City/Ada County Housing Authority*, 124 Idaho 450, 461-62, 860 P.2d 653, 664-65 (1993). Here the jury instructions did not do so because Jury Instruction 17 listed "overt acts" which could not be such as a matter of law. This permitted the jury to return a verdict upon an illegal basis.

3. The giving of Jury Instruction 17 was fundamental error.

Given the lack of objection to Jury Instruction 17, Mr. Medina must show the three prongs of the St*ate v. Perry*, *supra*., standard.

(a) *The listing of the "overt acts" violates Mr. Medina's unwaived constitutional rights to due process of law.*

Idaho Code § 18-1701, requires that a member to an agreement commit an overt act. *i.e.*, "any act to effect the object of the combination or conspiracy[,]" in order to be guilty of a criminal conspiracy. This is known as the overt act requirement. "For the purposes of a conspiracy: [an overt act is] an act performed

for the purpose of carrying out the conspiracy, a step toward its execution, and a manifestation that the conspiracy is at work." Ballentine's Law Dictionary. In Black's, "overt act" is defined as: "An outward act, however innocent in itself, done in furtherance of a conspiracy, treason, or criminal attempt." Black's Law Dictionary (Seventh ed. 1999). Thus, an overt act must be done 1) by a member of the agreement and 2) in furtherance of the conspiracy. However, as detailed below, Jury Instruction 17 listed acts which could not be an "overt act" as a matter of law. A verdict returned upon a jury finding of one of these improper overt acts would violate Mr. Medina's unwaived right to have a jury determine every element of the crime beyond a reasonable doubt under, *Jackson v. Virginia*, *supra* and *In re Winship*, *supra.*

Each instructed overt act is discussed below.

"1. On or about April 12, 2016, a search warrant was executed at apartment at 4170 Hawthorne in Chubbuck, Idaho belonging to JOYCE. During the search law enforcement seized approximately 157 grams of Heroin, JOYCE's cell phone and numerous other items."

No named member of the conspiracy executed the search warrant on Mr. Joyce's home; nor was this act done in furtherance of the conspiracy. As explained above, a law enforcement agent who is acting lawfully cannot be a member of the conspiracy he or she is seeking to thwart. *Sears v. United States*, *supra*. The portion of the instruction permitted the jury to find that an overt act was committed by law enforcement officers in order to thwart the agreement when the jury was

required to find the act was committed by a party to the agreement for the purpose of carrying out that agreement.

"3. JOYCE's phone contained a text message from JOYCE to SHARON BERNAL indicating JOYCE had wired $3,000 to BERNAL on or about April 2, 2016."

This is a statement of fact, not an allegation of an overt act.

"4. On or about April 13-14, 2016, detectives used JOYCE's phone to contact the above phone number and arranged to purchase 130 grams of Heroin for $8,000 from 'Jeffrey.'"

These acts by law enforcement agents were neither made by a member of the agreement, nor were they done in furtherance of the object of the conspiracy.

"7. MEDINA's cell phone was removed from his hands; a detective called the above number and the phone seized from MEDINA rang with the detective's phone number visible on the screen."

Again, acts by law enforcement agents who are seeking to thwart the conspiracy are not made by a member of the agreement, nor are they done in furtherance of the object of the conspiracy. *Sears v. United States*, *supra*.

"9. BERNAL was searched and approximately 127 grams of Heroin were discovered on her person."

Acts by law enforcement agents who are seeking to thwart the conspiracy are not made by a member of the agreement, nor are they done in furtherance of the object of the conspiracy. *Sears v. United States*, *supra*. In addition, the testimony elicited from Ms. Bernal-Valadez by the prosecutor established that she did not agree with Mr. Medina to possess or transport the heroin.

(b) *The error plainly exists and the failure to object was not tactical.*

No possible defense tactical or strategic purpose could be served by allowing Mr. Medina to be convicted upon these legally insufficient allegations. *See McKay v. State*, *supra*.

(c) *The error was prejudicial.*

The jury instruction was prejudicial because the jury must have returned a guilty verdict on an illegal basis. Only four of the nine overt acts alleged acts were taken by a named member of the charged conspiracy. But the jury could not have returned a guilty verdict based upon any of those overt acts.

"2. JOYCE provided detectives with information, including the phone number (716-773-9155) of the person ("Jeffrey") from whom JOYCE had previously purchased Heroin."

Mr. Joyce's post-arrest cooperation with the police was not in furtherance of the object of the conspiracy. This part of the instruction permitted the jury to return a guilty verdict upon an illegal basis.

"5. On or about April 14, 2016, BERNAL drove a vehicle to 4170 Hawthorne in Chubbuck, Idaho and parked."

The jury could not have found this overt act in furtherance of the conspiracy because Ms. Bernal-Valadez never agreed with Mr. Medina to deliver drugs to Mr. Joyce, or Detective Edgley. As shown in Section A(4) above, the evidence presented by the state established that Ms. Bernal-Valadez was not a member of the agreement.

"6. MEDINA, aka 'Jeffrey,' was a passenger in the vehicle."

This act could not have been found by the jury to be an overt act in furtherance of the conspiracy because there was no agreement between Mr. Medina and Mr. Joyce. As shown in Section A(3) above, they had a buyer-seller relationship. *United States v. Loveland*, *supra*.

"8. MEDINA told detectives he was there to collect $1,000 from JOYCE and that he and BERNAL bring Heroin to Pocatello from Utah."

The jury did not find this was an overt act in furtherance of the conspiracy. According to Detective Paul Olsen, Mr. Medina "said that he was there to pick up a thousand dollars from Logan and there were no drugs." T pg. 258, ln. 14-17. After the drugs were found, Mr. Medina said the drugs did not belong to either him or Ms. Bernal-Valadez, "but he could show [the police] where it came from" in Utah T pg. 260, ln.24 – pg. 261, ln. 2. These statements did not further the aims of the conspiracy and the jury would not have found this overt act in returning the guilty verdict.

Consequently, the jury must have found one of the other overt acts and Mr. Medina was prejudiced by the erroneous jury instruction. Thus, all three requirements of fundamental error have been established. This Court should vacate the conviction and remand for a new trial.

V. CONCLUSION

The Conspiracy conviction should be reversed and a judgment of acquittal entered because the state's evidence, taken as true, is constitutionally insufficient.

The remaining Trafficking conviction should be reversed because court committed fundamental error in permitting Mr. Medina to be shackled before the jury. (This error applies to the conspiracy charge too, if a judgment of acquittal is not granted.) Alternatively, the conspiracy conviction should be reversed because the court committed fundamental error by permitting the jury to return a guilty verdict based upon overt acts which were not committed by any named or unnamed conspirator and/or could not be done in furtherance of the conspiracy as a matter of law.

Respectfully submitted this 30th day of March, 2018.

/s/ Dennis Benjamin
Dennis Benjamin
Attorney for Appellant

CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email address(es):

Idaho State Attorney General
Criminal Law Division
ecf@ag.idaho.gov

Dated and certified this 30th day of March, 2018.

/s/Dennis Benjamin
Dennis Benjamin