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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,

Plaintiff-Respondent,

vs.

JOHN ROBERT RODRIGUEZ,

Defendant-Appellant.

SUPREME COURT NO. 46333-2018

ADA COUNTY NO. CR01-17-51270

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REPLY BRIEF OF APPELLANT JOHN ROBERT RODRIGUEZ

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APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF ADA

---

HONORABLE JONATHAN MEDEMA  
District Judge

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**II. BECAUSE THE JURY ACQUITTED JOHN RODRIGUEZ OF SELLING THE FIREARM TO PROMOTE GANG OR CRIMINAL ACTIVITIES, HIS CONVICTION FOR SELLING THAT FIREARM TO A GANG MEMBER VIOLATES THE FIRST, SECOND AND FOURTEENTH AMENDMENTS AS APPLIED TO HIS CONDUCT**

According to the jury verdict, Appellant John Rodriguez knew that the informant was a Norteno gang member when he provided the informant with his firearm but the state failed to prove that Mr. Rodriguez provided the firearm at the gang's direction or knowingly for its benefit. Thus, as applied to Mr. Rodriguez's conduct, the Firearm Provision to the "Idaho Criminal Gang Enforcement Act," I.C. § 18-8501 *et seq* (herein "ICGEA") criminalized his firearm sale based on association. Additionally, because Mr. Rodriguez's firearm transfer made without intent to further gang activity, his conduct lacked any nexus to the harm visited by criminal gangs and was untethered to Mr. Rodriguez's personal criminal intent. Accordingly, the Firearm Provision violates the First, Second and Fourteenth Amendments to the United States Constitution as applied to Mr. Rodriguez.

In response, the state casts Mr. Rodriguez's arguments as facial constitutional challenges and argues that such challenges are incompatible with the fundamental error doctrine. However, Mr. Rodriguez's constitutional claims arose when the jury convicted him of the Firearm Provision but acquitted him of the enhancement for supplying the firearm with intent to further the gang activity. Mr. Rodriguez's "as applied" challenges are challenges to the sufficiency of the evidence supporting his conviction, which need not be preserved via a motion for judgment of acquittal. Even if Mr. Rodriguez were required to establish fundamental error, the record

establishes clear and obvious violations of his unwaived constitutional rights. This Court should vacate his judgment of conviction and sentence.

**A. Fundamental Error Is Inapplicable to Mr. Rodriguez’s Argument That Insufficient Evidence Supports The Verdict Because The ICGEA Violates The First, Second and Fourteenth Amendments as Applied to His Conduct**

A statute may be challenged as unconstitutional “on its face” or “as applied” to the party’s conduct. *Hernandez v. Hernandez*, 151 Idaho 882, 884, 265 P.3d 495, 497 (2011); *Lochsa Falls, L.L.C. v. State*, 147 Idaho 232, 240–41, 207 P.3d 963, 971–72 (2009). A party prevails on an as-applied challenge by demonstrating that the statute is unconstitutional as applied in a specific instance. *Hernandez*, 151 Idaho at 884, 265 P.3d at 497; *Lochsa Falls, L.L.C.*, 147 Idaho at 241, 207 P.3d at 972. The particular facts necessary to establish an as applied challenge can be difficult to ascertain without the benefit of a trial. *State v. Manzanares*, 152 Idaho 410, 426–27, 272 P.3d 382, 398–99 (2012); *State v. Cook*, 146 Idaho 261, 263, 192 P.3d 1085, 1087 (Ct. App. 2008).

Here, the Firearm Provision became unconstitutional as applied to Mr. Rodriguez’s conduct only after the jury convicted him of the firearm transfer while acquitting him of doing so for a gang related purpose. Challenges to the sufficiency of the evidence are appropriately raised for the first time on appeal, including challenges based on legal arguments. *See State v. Wilson*, 165 Idaho 64, 438 P.3d 302, 305 (2019) (construing statute to address whether sufficient evidence was presented to establish intent element at trial); *State v. Herren*, 157 Idaho 722, 725, 339 P.3d 1126, 1129 (2014) (construing I.C. § 18–920 in determining there was no substantial and competent evidence to support the conviction); *State v. Medrain*, 143 Idaho 329, 332, 144 P.

3d 34, 37 (Ct. App. 2006) (noting the appellate court may consider the sufficiency of the totality of evidence presented at trial when the issue is raised on appeal, regardless of whether the defendant also sought review of that question in the trial court); *State v. Ashley*, 126 Idaho 694, 698-700, 889 P.2d 723, 727-29 (Ct. App. 1994) (same).

The state argues that Mr. Rodriguez raises “an overbreadth challenge . . . as opposed to an as-applied challenge” and because “an overbreadth claim is not a claim that the defendant’s constitutional rights have been infringed” it “necessarily fails under the first prong of the fundamental error test.” Respondent’s Brief, p. 5. However, as noted, Mr. Rodriguez challenges the Firearm Provision’s constitutionality as applied to his conduct. Mr. Rodriguez’s references in his opening brief to the statute’s broader infirmity do not change that his argument relies on as found by the jury — specifically, one person with Norteno affiliation who legally owned a firearm and transferred it to a Norteno gang member who also could legally own a firearm, where the transfer was not made with the intent to further gang activity.

Nor is this case similar to *State v. Pentico*, 151 Idaho 906, 265 P.3d 519 (Ct. App. 2011), where the defendant challenged the constitutionality of the trespass statute as to his conduct during one incident via a motion to dismiss but not regarding an earlier incident. On appeal, the defendant argued the statute was unconstitutional as applied to the earlier incident not addressed in the motion to dismiss. However, the defendant had filed a motion in limine to limit any testimony regarding his other crimes, wrongs or acts that led up to his eviction from public property and, thus, the record did not establish the error was clear and obvious without the need

for reference to any additional information not contained in the appellate record. *Pentico*, 151 Idaho at 913, 265 P.3d at 526.

Here, the constitutional challenges arose after the jury convicted Mr. Rodriguez of the Firearm Provision and acquitted him of the enhancement for doing so with intent to further the gang's purposes. Unlike a situation where a defendant forgoes objections during or prior to trial, Mr. Rodriguez gained no strategic advantage from foregoing a motion for judgment of acquittal after the verdict. Instead, the record reveals that Mr. Rodriguez's attorney would not return his calls, that Mr. Rodriguez did not have money to pay him and he refused to file a notice of appeal on his behalf. Thus, Mr. Rodriguez personally wrote the district court, who appointed the public defender in order to file an appeal from the judgment of conviction. R. 236. In such circumstances, it is clear and obvious that Mr. Rodriguez did not waive a post-trial motion for some strategic advantage. Instead, it appears that he was unable to pay his attorney to continue to fight the case.

Mr. Rodriguez's "as applied" challenges to his conviction based on the First, Second and Fourteenth Amendments developed after the verdict. Challenges to the sufficiency of the evidence are appropriately raised on appeal and this Court should vacate Mr. Rodriguez's judgment of conviction.

**B. Mr. Rodriguez's Conviction Under the Firearm Provision Implicated His Right of Association**

The state claims that Mr. Rodriguez's right to associate was not implicated by his conviction for selling a gang member his gun because he was not required to have gang

affiliation in order to be guilty. However, the evidence at trial established that Mr. Rodriguez associated with members of the Norteno gang, may have been a member and sold his personal firearm to someone the jury concluded was a Norteno.

Had Mr. Rodriguez associated with a different kind of social group — hunters or target shooting enthusiasts — he would be free to sell his firearm to his associates without fear of penalty, so long as the transaction was otherwise lawful. However, because Mr. Rodriguez’s friends are Nortenos, he committed a crime solely by engaging in conduct that would be legal if his friends were not members of a gang. As applied here, the Firearm Provision imposes criminal sanctions on a firearm sale that was not intended to promote gang or criminal activities and thus criminalizes the sale of a firearm based on association alone. Because I.C. § 18-8505 violates the First Amendment as applied to the facts found by the jury, this Court should vacate Mr. Rodriguez’s judgment of conviction.

**C. The Firearm Provision Substantially Infringes On Conduct Protected By The Second Amendment And, Because It Is Not Limited To Providing A Firearm With Intent To Further Gang Or Criminal Activity, Fails To Further The Statute’s Legitimate Goal**

The state introduced no evidence that the informant engaged in recent criminal or gang conduct or that Mr. Rodriguez believed the informant had engaged in recent gang activity. In this case, based on the jury’s acquittal of the enhancement, the statute applies to firearms expressly not for use in association with the gang or criminal activities. The Firearm Provision thus violates the Second Amendment by infringing on the the right bear arms of persons like Mr.

Rodriguez, who qualify associate with persons who are gang members under the ICGEA but who are not felons and do intend firearms to be used for gang or criminal purposes.

In response, the state argues that Mr. Rodriguez's raises an "overbreadth argument" and because such an argument does not implicate his constitutional rights, he does not articulate a cognizable fundamental error claim. Respondent's Brief, p. 9. However, as explained above, Mr. Rodriguez argues that the Firearm Provision violates the Second Amendment as applied to his conduct. The claim arose following trial and Mr. Rodriguez was not required to raise his challenge to the sufficiency of the evidence in the trial court. Even if he did, he asserts his rights under the Second Amendment were violated and, as explained above, failing to file a post-trial motion for judgment of acquittal was not for some tactical purpose.

The state does not respond to Mr. Rodriguez's arguments concerning the Second Amendment and no further reply is required.

**D. The Relationship Between Transferring a Firearm to Someone Who Happens to Be a Gang Member, When That Transfer Is Not Intended to Further Gang or Criminal Activity, is Too Tenuous to Support Criminal Liability and Violates Due Process**

As argued in Mr. Rodriguez's opening brief, a statute violates due process when it criminalizes membership or participation in an organization (even if that organization engages in criminal activity) without distinguishing people who do not share the goals of the organization's unlawful purposes and do not participate in its unlawful activities. *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Noto v. United States*, 367 U.S. 290 (1961); *Elfbrandt v. Russell*, 384 U.S. 11 (1966); *Scales v. United States*, 367 U.S. 203, 226 (1961); *Manzanares*, 152 Idaho at 425, 272 P.3d at 397.

As in *State v. Bonds*, 502 S.W.3d 118 (Tenn. Crim. App. 2016), the ICGEA does not prohibit gang membership or affiliation and a defendant's affiliation with such a group is statutorily permissible and innocuous until it is joined with otherwise criminal conduct. Here, Mr. Rodriguez was acquitted of the enhancement and, thus, the Firearm Provision expressly criminalized his transfer for a purpose *other* than promoting gang activity or crime. Without requiring the firearm transfer to be for a gang-related or criminal purpose, it was untethered to Mr. Rodriguez's personal criminal intent or conduct and violates due process.

The state offers no response to this argument. Thus, no reply is warranted.

### III. CONCLUSION

Because Mr. Rodriguez's conviction is expressly not based on the intent to further gang activity, his conviction punishes association alone, infringes on his right to bear arms and lacks any nexus with the harm sought to be remedied by the ICGEA's firearm provision. Accordingly, for all the reasons set forth above and in Mr. Rodriguez's opening brief, the Firearm Provision violates the First and Second Amendments and the Due Process Clause of the Fourteenth Amendment as applied to Mr. Rodriguez's conduct and this Court should vacate Mr. Rodriguez's judgment of conviction.

Respectfully submitted this 25th day of October 2019.

FYFFE LAW, LLC

/s/ Robyn Fyffe  
ROBYN FYFFE  
Attorney for John Rodriguez

**CERTIFICATE OF SERVICE**

I CERTIFY that on October 25, 2019, I served the foregoing document via the File and Serve system to the email that was identified as the service contact for the Criminal Appellate Unit of the Office of the Attorney General.

/s/ Robyn Fyffe  
ROBYN FYFFE